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IN THE

Supreme Court of the United States

TERM, 1981

No.

EDWARD J. SWEENEY & SONS, INC.,
MISSION GAS OIL COMPANY, INC.
AND
PETROLEUM PRODUCTS CO.,
Petitioners

vs.

TEXACO, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Do the lower courts' requirements that to withstand a motion for directed verdict, an antitrust plaintiff must show direct evidence of the causal nexus between competitors' complaints to a supplier about a discounter's marketing behavior and the supplier's actions in response thereto impose an improper restriction on the quantum and character of the evidence needed to bring an action within the scope of Section 1 of the Sherman Act?

2. Was it proper for the Third Circuit to affirm the lower court's direction of the verdict when the ruling was the result of the lower court's weighing the evidence and determining the credibility of witnesses?

3. When a seller charges different prices, based on an admitted phantom event, to competing purchasers who perform identical marketing functions, is there evidence of price discrimination violative of § 2(a) of the Robinson Patman Act sufficient to withstand the denial, on the merits, of injunctive relief? In reviewing this question was it unconstitutional for the Third Circuit to apply a different standard to large purchasers than to small purchasers?

4. Where there is proof of direct damage to a disfavored purchaser who absorbed the increased costs as a result of price discrimination violative of § 2(a) of the Robinson Patman Act, should the case be submitted to the jury to determine the amount of damages?

5. Does summary judgment against indirect purchasers who purchase on a cost-plus basis contradict the recognized exception to the indirect purchaser doctrine in *Illinois Brick?*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Edward J. Sweeney & Sons, Inc., Mission Gas Oil Company, Inc. and Petroleum Products Co., respectfully pray that a Writ of Certiorari issue to review the judgments and opinion of the United States Court of Appeals in the proceeding on November 3, 1980.

In addition, Petitioners respectfully pray that a Writ of Certiorari issue to review that final order of the United States Court of Appeals, Third Circuit, on to-wit, November 28, 1980, which denied Petitioners' Petition for Rehearing.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals, Third Circuit, unofficially reported in 1980-81 Trade Cases ¶ 63,611, at 77,226 (3d Cir. 1980), appears as Appendix A hereto. The opinion of the United States District Court for

the Eastern District of Pennsylvania, reported in 478 F. Supp. 243 (E.D. Pa. 1979), appears as Appendix B. The judgment of the Court of Appeals for the Third Circuit denying Rehearing appears as Exhibit C. The Order of the United States District Court for the Eastern District of Pennsylvania, dated June 1, 1979, granting partial summary judgment against petitioners Mission and Petroleum on their damage claims, appears as Appendix D.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit was entered on November 3, 1980. Petitioners' Petition for Rehearing was denied November 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition was filed within ninety days of the Third Circuit's Order denying a rehearing.

STATUTORY PROVISIONS INVOLVED

The following statutes involved are set forth in Appendix E:

Section 1 of the Sherman Act, 15 U.S.C. § 1;

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a);

Section 4 of the Clayton Act, 15 U.S.C. § 15;

Section 16 of the Clayton Act, 15 U.S.C. § 26.

STATEMENT OF THE CASE

This is an antitrust case brought by petitioners Edward J. Sweeney & Sons, Inc. ("Sweeney"), Mission Gas Oil Company, Inc. ("Mission"), and Petroleum Products Co. ("Petroleum") against respondent Texaco, Inc. ("Texaco"). Claims were made for violations of Sections 1 and 2[1] of the Sherman Act (15 U.S.C. §§ 1, 2) and Section 2(a) of the Robinson-Patman Act, (15 U.S.C. § 13(a)), seeking damages and injunctive relief under § 4 and § 16 of the Clayton Act (15 U.S.C. §§ 15, 26). In response to a motion by Texaco for partial summary judgment, the claims of Mission and Petroleum[2] for damages were dismissed on June 1, 1979. Their claims for injunctive relief were permitted to remain.

The case went to a jury trial in the Eastern District of Pennsylvania before the Honorable Edward N. Cahn on June 5, 1979. The evidence in the eight day jury trial showed as follows:

Sweeney has been a wholesaler and distributor of Texaco gasoline in the Eastern Pennsylvania-Southern New Jersey area since 1958, which also owns retail gasoline stations in the area. Sweeney entered into a distributor agreement with Texaco, a refiner of gasoline, in 1963.

Sometime in 1965 or 1966, gasoline stations supplied by Sweeney began selling at a discount. Although other discount stations sold unbranded gasoline, the Sweeney stations sold Texaco branded gasoline at a price of between one and three cents per gallon less than the price of other branded gasoline sold in the area. These Sweeney-supplied stations were able to charge the lower price because they were primarily "gas and go" operations, as opposed to full service stations, and because Sweeney was passing on cost savings generated from the "hauling allowance" Texaco paid Sweeney for transporting gasoline.

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[1] Petitioners' claim under Section 2 of the Sherman Act is not before this Court in this Petition.

[2] Petitioners Mission and Petroleum are distributors who purchased gasoline from Sweeney on a cost-plus basis.

In the Southeastern Pennsylvania-Southern New Jersey market, Sweeney became an active competitive force in two levels of gasoline distribution. Its retail "gas and go" stations competed with other Texaco branded stations, including Texaco investment-retail stations.[3] Sweeney also competed with all other Texaco distributors in the area, including Grace Oil Company (Grace), Dan-D Oil Company ("Dan-D"), and Farm and Home Oil Company ("Farm & Home"), who also received hauling allowances. Texaco paid a different hauling allowance to each distributor, because the amount was formulated by the distance between the Texaco distribution point and the location of the distributor's bulk plant facility.

The hauling allowance was the *only* element of price to the distributor which could be varied, since Texaco charged each distributor the same tank wagon price prior to deducting the hauling allowance discount. The hauling allowance was not really related to any service, because all the distributors, with Texaco's knowledge, would routinely drop off gasoline to their customers' stations prior to reaching their respective bulk plants. The allowance became an element of the price of gasoline to the distributor, and nothing more.

By 1970, Sweeney's market share in terms of volume and its customer territory had increased enormously because of its discount pricing strategy. Sweeney was able to increase its volume from 3.8 million gallons in 1967 to 17.7 million gallons in 1970.[4] During this time, Sweeney was picking up gasoline at Texaco's Westville, New Jersey distribution point, as were its

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[3] Texaco received monthly revenue from these investment stations based upon the volume of gasoline sold. These investment-retail stations were directly supplied by Texaco and sold Texaco brand gasoline at higher retail prices than the Sweeney stations located in close proximity in the same area.

[4] Sweeney even won a contest sponsored by Texaco in 1968 when it experienced the greatest increase in gallonage among wholesalers in the area. Although the trial judge would not admit the document which demonstrates this fact into evidence, the court cited the exhibit in its opinion. (Appendix B, at p. 91).

competitors, Grace, Farm & Home and Dan-D. Sweeney supplied many retail stations in the entire area, with many stations located in close proximity to the Westville distribution terminal, as did Grace, Farm & Home and Dan-D.

Sweeney's prosperity and its discount pricing did not go unnoticed by Texaco, the other distributors operating in the area and the retail gasoline stations directly supplied by Texaco. The distributor and retail competitors began to complain to Texaco about Sweeney's pricing practices and their adverse effect on the complainants. In December 1970, Texaco informed Sweeney that it was changing his supply point from Westville, New Jersey to Macungie, Pennsylvania. This change would reduce Sweeney's hauling allowance by half, force Sweeney to pick up gasoline at a point far distant from many of its stations, and place Sweeney at a disadvantage as to the other distributors competing in the market area who still had the Westville, New Jersey supply point. Texaco maintained that there was a cost saving to Texaco, although the only evidence it produced to support this assertion was a study prepared four years earlier, which showed that Texaco would save only $2200 a year. When Sweeney objected to this change in supply facility, Texaco attempted to cancel its 1963 distributor agreement. Sweeney's efforts to obtain another supplier of gasoline failed. After negotiations with Texaco, Sweeney agreed to accept the reduced hauling allowance, based upon pick-up at Texaco's Macungie, Pennsylvania terminal, while still picking up its product at the Westville, New Jersey terminal, rather than be cut off entirely by Texaco.

Subsequently, in 1971, Sweeney-supplied stations continued to underprice their Texaco competition. The distributors and retailers competing with Sweeney in the market continued to complain to Texaco about Sweeney's pricing. The complaints and Sweeney's pricing were discussed among Texaco's hierarchy at its headquarters, and Texaco sent an employee from its headquarters to investigate the complaints. In addition, Texaco's direct retailers were losing volume which resulted in loss of revenue to Texaco from those operations. In December 1971, Texaco sent Sweeney a notice of cancellation of its distributor agree-

ment. Despite Sweeney's requests, Texaco refused to give any reason for its termination.[5]

Texaco asserted at trial that its actions against Sweeney were not the result of a combination or conspiracy between Texaco and Sweeney's competitors, but instead were unilateral actions based upon its business interests. Texaco offered evidence that the reasons for termination consisted of, *inter alia,* Sweeney's aggressive price cutting, customer complaints concerning Sweeney, and Sweeney's commingling of Texaco gasoline with that of another refiner. Sweeney rebutted the business justification arguments with evidence that Texaco never had any conversation or communication with Sweeney concerning customer complaints or brand integrity prior to the notice of termination. Texaco had never conducted surveillance of any distributor in the area despite its knowledge that other distributors had commingled, its own use of the gasoline of other refiners, and despite the fact that its general business relationship with Sweeney prior to that time had been good, with Sweeney generally receiving the prompt payment discount on purchases from Texaco.[6]

After eight days of trial, the court granted a Motion for Directed Verdict, which had been filed by Texaco at the conclusion of presentation of all evidence. Opinions and Orders encompassing this ruling, and the court's denial of injunctive relief for petitioners and grant of injunctive relief for Texaco on its counterclaims, were filed on August 31, 1979 and September 4, 1979 respectively. The basis of the district court's opinion was that there was insufficient evidence of a combination or conspiracy in violation of Section 1 of the Sherman Act to go to a

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[5] Texaco continued to supply Sweeney during the litigation in part, at least, because of Department of Energy regulations which were adopted. However, on December 11, 1979, Texaco notified the Department of Energy that it desired to terminate Sweeney as a supplier. This is currently being litigated. Moreover, on February 20, 1981, Sweeney was given handwritten notice that Texaco will terminate Sweeney's gasoline supply 60 days from that date.

[6] In a Texaco Wholesale Market Study, which the court refused to admit into evidence, Sweeney's stations were deemed to be of good quality, as opposed to their competitors' stations which were deemed fair.

jury, and that even though a jury might find that there was price discrimination in violation of Section 2(a) of the Robinson-Patman Act, the standard of proof of "actual" damages had not been met. In denying injunctive relief, the district court found that the directed verdict foreclosed such relief on the Sherman Act claims, and found as the trier-of-fact that there had been no discrimination in violation of the Robinson-Patman Act.

Petitioners appealed all three orders (June 1, 1979, August 31, 1979 and September 4, 1979) to the Third Circuit Court of Appeals (Third Circuit), which affirmed the district court's decisions on all issues by a vote of two to one, with a strong dissent. Subsequently, petitioners filed a Petition for Rehearing with the Third Circuit. On November 28, 1980, said Petition was denied, with two judges voting for rehearing.

REASONS FOR GRANTING THE WRIT

I. Viewing All The Evidence Presented, The Circumstantial Evidence Presented Was Sufficient To Show Conspiracy In Violation Of § 1 Of The Sherman Act And To Submit The Case To The Jury.

The Third Circuit majority opinion held that evidence of competitors' complaints about a discounter to a supplier and the supplier's actions in response thereto is insufficient to show a Sherman Act § 1 combination or conspiracy, and that, in this case, petitioners had failed to show even a causal connection between the competitors' complaints and the supplier's actions. These restrictive holdings concerning the quantum and character of the evidence required for jury consideration of a Section 1 Sherman Act case seriously undermine the decisions of this Court and conflict with decisions of the Second, Seventh and Ninth Circuits, and prior decisions of the Third Circuit, concerning the essential role of circumstantial evidence in proving an unlawful combination or conspiracy. The decision below should be reviewed because it disregards the realities of market

behavior, abrogates the jury's role as finder of fact, ignores the virtual impossibility of producing direct evidence of unlawful combination, and imposes an unwarranted standard of proof upon antitrust plaintiffs.

The well settled standard for reviewing a motion for a directed verdict is that the evidence must be viewed as a whole, drawing all reasonable inferences in favor of the party opposing the directed verdict, and that the credibility of witnesses and evidence should not be weighed. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696-699 (1962). Both the district court and the Third Circuit panel majority departed from this undisputed tenet in this case. The Third Circuit opinion, echoing the district court, ignored a plethora of evidence presented at trial by Sweeney,[7] and then concluded that the evidence was "meager" and "insufficient". On the other hand, the dissent below, viewing the evidence as a whole, concluded that a jury could have found a Sherman Act § 1 violation.

More importantly, both courts usurped the jury's function as a finder of fact by selectively and mistakenly examining the evidence and by weighing the credibility of witnesses. The majority below's selective analysis is exemplified in its treatment of the testimony of Daniel A. Doherty, Texaco's Regional Manager for the Philadelphia Region. Doherty offered unilateral business justifications for Texaco's actions against Sweeney. The majority opinion focuses on those segments of his testimony, stresses statements which arguably were self-serving, and concludes that Sweeney's price-cutting marketing strategy was not a determinative factor in Texaco's decisions and actions. (Appendix A, at pp. 41-43).

It has been well established by this Court that action which appears to be unilateral behavior can be considered as part of a

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[7] The district court considered only two pieces of evidence: complaints were made to Texaco and the testimony of one of petitioners' witnesses which was characterized as biased and speculative. The majority below considered the testimony of two additional witnesses: the Texaco executive who terminated Sweeney, and a part of the testimony of another Texaco employee, Glenn B. Murray, which the court below concluded was entitled to little or no weight.

combination when viewed in light of the surrounding circumstances. *See, e.g., United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600 (1914). In this case, Doherty, who made the decision to terminate Sweeney's distributor agreement, testified that he was aware of the complaints to Texaco from competing retailers and distributors about Sweeney's pricing tactics prior to his decision, and he was aware of Sweeney's price cutting strategy. Further, he admitted that "Sweeney's marketing strategy" and "the consequences of it" were among the elements that entered into his decision to terminate Sweeney. (Appendix A, at p. 41).

When different inferences might easily be drawn from the evidence, it is the jury which " 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts' ". *Continental Ore v. Union Carbide, supra* at 700-701, quoting *Tennant v. Peoria & P.U.Ry. Co.*, 321 U.S. 29, 35 (1944). The circumstances surrounding Texaco's actions of changing Sweeney's hauling allowance and terminating its distributorship were not subject to only one interpretation. Whether Texaco acted in response to the complaints to curtail the competitive situation created by Sweeney's price cutting practices was a fact issue which should have been submitted to the jury.

The court below's statement "that even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence alone would not show the necessary concerted action" (Appendix A, at p. 38) is a novel and restrictive interpretation of antitrust law. This holding is also contrary to the long and unbroken series of decisions of this Court which has established that direct evidence of a combination or conspiracy is not necessary in a Sherman Act § 1 case, and that it may be proved entirely by circumstantial evidence. *United States v. General Motors Corp.*, 384 U.S. 127, 142-143 (1966). *See also, United States v. Parke, Davis & Co., supra* at 43; *Interstate Circuit v. United States, supra at* 221; *FTC v. Beech-Nut*

Packing Co., 257 U.S. 441, 455 (1922). This Court has recognized that conspiracies or combinations, by their very nature, are seldom susceptible to direct proof, and may be inferred from circumstantial evidence such as the conduct of the alleged conspirators. *Interstate Circuit v. United States, supra* at 221; *Eastern States Retail Lumber Dealers' Ass'n. v. United States, supra* at 612. Therefore it is improper for a court in a § 1 Sherman Act case to require that "the relevant circumstances compel an inference of conspiracy with the directness and ineluctability of a logician's proof." *Trist v. First Fed. S&L Assn. of Chester,* 466 F.Supp. 578, 590 (E.D. Pa. 1979). This, however, is the effect of the Third Circuit's opinion in the instant case.

No authority is cited by the court below in support of its proposition that complaints and responsive action cannot constitute a combination necessary to bring an action within the scope of Section 1 of the Sherman Act. The district court relied on four cases to support its acceptance of this proposition: *Westinghouse Electric Corp. v. CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963); *Carr Electronics Corp. v. Sony Corp. of America,* 472 F. Supp. 9 (N.D. Cal. 1979); *Carbon Steel Products Corp. v. Alan Wood Steel Co.,* 289 F. Supp. 584 (S.D.N.Y. 1968). These cases are not dispositive of the instant case; they are factually distinguishable and/or do not support the proposition for which they were cited.

The Seventh Circuit, in the recent case of *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980), explicitly rejected the defendants' arguments that circumstantial evidence of competitors' complaints and responsive actions thereto was insufficient evidence to support an inference of illegal conspiracy.[8] It found that the two cases relied upon by the defendants (and the district court in *Sweeney*), *Klein* and

[8] In *Trabert & Hoeffer,* the Seventh Circuit affirmed the judgment of the district court, sitting without a jury, that the circumstantial evidence of complaints about plaintiff's excessive discounting by its competitors and the supplier's action and conduct in response to the complaints supported a reasonable inference of illegal conspiracy or combination in violation of Section 1 of the Sherman Act. *Supra* at 480-481.

Carbon Steel, were inapplicable. *Id.* at 482. Both cases are similarly distinguishable from the instant case. In *Klein,* 323 F.2d at 789, 791, the court's decision turned on the fact that there was no evidence that the complaints were directed against a particular retailer or that the manufacturer ever received the complaints. There could be no combination with the manufacturer under that circumstance. In *Sweeney,* however, there was ample evidence that the complaints were specifically directed at Sweeney's discount pricing and that Texaco's corporate decision-makers not only received the complaints, but also discussed them and investigated Sweeney's pricing practices in the market prior to the termination. In *Carbon Steel,* 289 F.Supp. at 588, the decision granting summary judgment for defendant was based on the absence of any indication that the refusal to deal was enacted for the reasons cited in the two customer complaints. There, defendant's denial that the purported offensive activity was a reason for its action was supported by uncontradicted evidence of good business reasons for terminating Carbon.[9]

The district court below also relied on the Ninth Circuit case, *Westinghouse Electric Corp. v. CX Processing Laboratories, Inc.,* 523 F.2d 668 (9th Cir. 1975). That case is inapposite because it does not even address the issue of whether complaints and responsive action constitute a Sherman Act § 1 combination. The Ninth Circuit affirmed judgment for defendant because there was no evidence of any complaints to Westinghouse about CX's marketing practices. The court expressly noted that the telephone calls to Westinghouse by CX's competitors were requests for favorable price arrangements similar to those which CX enjoyed, and were not complaints. *Id.* at 674.

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[9] Further it is respectfully submitted that *Carbon Steel* erroneously interpreted *Klein* as holding that: "A combinatior violative of Section 1 of the Sherman Act *cannot* be implied from [the fact of competitors' complaints], since it was the normal working of the marketplace for them to do so." *Id.* at 588. (emphasis added). In the contrary, the Third Circuit in *Klein* did not state such a sweeping rule; nor has any other Circuit adopted it.

Another Ninth Circuit decision, where the court considered a fact situation similar to that presented in Sweeney, was not addressed by the court below and was disregarded by the district court. In *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963), the court reversed the decision of the district court in granting a directed verdict for defendant, finding that sufficient circumstantial evidence of a combination was presented to warrant submission of the case to a jury. In that case, as here, the basis of the conspiracy claim was competitors' complaints about a discounter to the manufacturer, and responsive action by the manufacturer in cutting off the discounter's source of supply. The Ninth Circuit, unlike the courts below, took a realistic view of the difficulties in producing direct evidence in such cases, noting that neither the complainants nor the supplier's officers are likely to testify to a conspiracy; but that circumstantial evidence "is the only manner in which a case of this kind could ordinarily be established." *Id.* at 200. The court also held that it would be a fair inference that the complaints were designed to elicit some action by the manufacturer. As Judge Pope stated *id.*:

> It seems to us to be clear that if the facts here, as claimed by the appellant, are that Oranges as a competitor of Girardi, the price cutter, induced and participated in action which resulted in Girardi being cut off from a supply of this merchandise, then the case would be precisely within the rationale of *United States v. Socony-Vacuum Oil Co.*, [310 U.S. 150 (1940)], for it is normally the competitor who is being hurt by price cutting who is likely to seek coercive action against the competitor who is hurting or likely to hurt him. We think that a typical case of illegal conspiracy to fix prices would arise from the desire of one dealer to eliminate his price cutting competitor through concerted action with the manufacturer. The simplicity of the case claimed by appellant is no argument against him.

The district court's disregard of *Girardi* in this case resulted from its myopic and selective consideration of the evidence presented by Sweeney as well as its specious analysis of the cases it

relied on. Instead of making a paradigmatic comparison to the particular facts in *Girardi* and *Carr Electronics, supra,*[10] the court should have decided the instant case based upon its own particular facts. *Maple Flooring Mfrs.' Ass'n. v. United States,* 268 U.S. 563, 579 (1925).

Here, neither the district court nor appellate majority considered all the evidence presented by Sweeney. Nor did either lower court view the evidence to see whether the existence of a conspiracy could be proved by a development and collation of the circumstances, and inferred from the things said and done. *Loew's, Inc. v. Cinema Amusements,* 210 F.2d 86 (10th Cir. 1954). Instead, the district court explicitly found that Sweeney's evidence was insufficient because there was no direct evidence that Texaco took its actions against Sweeney in response to the competitors' complaints. The court specifically stated that Sweeney's evidence was deficient because "Sweeney had not even introduced evidence of internal memoranda" of Texaco which would indicate that Texaco responded to the complainants, nor had Sweeney introduced evidence that Texaco "told Sweeney that it would take any action in response thereto" (Appendix B, at p. 106). Therefore, it is apparent that the effect of the Third Circuit's opinion is to require nothing less than *direct* evidence of the causal relation between the complaints and Texaco actions. The majority discounted the testimony of two former Texaco employees with extensive experience at Texaco and knowledge of how Texaco's business decisions were made because neither of them testified that he knew *as a fact* that Texaco changed Sweeney's hauling allowance and terminated Sweeney in response to the competitors' complaints. By

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[10] In *Carr,* plaintiff alleged that it was terminated because it failed to follow Sony's retail price suggestions. The record contained only evidence of complaints by dealers and Sony's action of terminating Carr. There was no evidence that other dealers followed Sony's suggested prices, and there was evidence that other dealers priced *below* Carr. The court held that there was no evidence of any reason for the termination, reasons that would lend credence to Carr's theory that Sony acted in response to dealer complaints.

requiring such direct evidence of a combination, the Third Circuit's opinion may insulate a sophisticated business concern, such as Texaco, from antitrust liability. Potentially incriminating internal memoranda are rarely maintained and are easily destroyed,[11] and corporate officers often are hostile witnesses. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Further, reading a requisite of prior warning into proof of a Sherman Act § 1 combination is illogical and contravenes the purposes of the antitrust laws because it places the fulfillment of that requirement solely in the hands of the alleged conspirators.

The Third Circuit's opinion is also contradictory to a prior opinion of this Circuit, *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979). There the court considered the plaintiff retail store's allegation that the defendants, a supplier ("United") and its agent ("Lappin"), terminated him because of the complaints of another retailer ("Famous"), and found that the necessary elements of a conspiracy existed and that it would be a *per se* violation of Section 1 of the Sherman Act, if proven at trial. Judge Adams[12] stated:

> Cernuto's pretrial narrative statement points to the centrality of price in the combination of Famous, Lappin, and United to cut off plaintiff. The thrust of Famous' communication to United, it is alleged, was 'that (Cernuto) was selling United products in Famous' territory and that (Cernuto) was a low price volume dealer.' [footnote omitted] Cernuto is a 'discount house', and, it must be presumed, was prepared to sell United cabinets at prices lower than those offered by Famous. Famous' concern, understandably, was that Cernuto's low prices would force

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[11] This Court recognized this in *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704 (1969) where it was held that the existence of letters, agreements or any other testimonial to a conspiracy is not necessary to prove an unlawful conspiracy.

[12] It is pertinent that neither Judge Adams nor Judge Weis, the Third Circuit judges in *Cernuto*, sat on the panel in *Sweeney* nor considered the petition for rehearing.

> Famous' own prices down if it were to compete effectively in selling United cabinets. By prevailing upon United and Lappin to terminate their contract with Cernuto, Famous effectively eliminated the threatened competition and was able to maintain prices at its own preferred levels. It is just this type of conduct that the antitrust laws are designed to reach. [parentheses in original]

Id. at 169. The Third Circuit in *Sweeney* has narrowly interpreted *Cernuto* to hold only that the action alleged a *per se* violation of the Sherman Act. (Appendix A, at p. 46). However, the Seventh Circuit in two recent cases has expressly adopted the reasoning in *Cernuto* pertaining to both sufficiency of evidence of conspiracy and *per se* violation. In *Alloy International Co. v. Hoover-NSK Bearing Co.*, 1980-81 Trade Cases ¶63,148, at 77,706 (7th Cir. 1980), Judge Tone relied primarily on *Cernuto,* which was quoted at length and explicitly followed, where a competitor complained about a price cutter to the supplier and the price cutter was terminated. The court held that the evidence "would have permitted the jury to find that the defendant, manufacturer refused to sell to the plaintiff distributor as a result of an agreement with the latter's competitor aimed at eliminating price competition between the distributors." *Id.* at 77,707. It is significant that in this case there was no direct evidence of the causal connection between the complaints and the termination. The Seventh Circuit did interpret *Cernuto* as requiring that the manufacturer also must be price motivated, but proof of that motivation was circumstantial evidence that the manufacturer "recognized that its ability [to raise its own prices] might well be influenced by the prices at which the bearings were resold abroad." *Id.* at 77,707. Similarly in *Sweeney,* evidence was presented that Texaco wanted to eliminate or reduce price competition for its gasoline including, *inter alia,* that Sweeney's price cutting adversely affected Texaco's investment-retailers' volume and price, and adversely affected Texaco's rental revenue from those investment stations which was based upon their volume. In *Alloy International,* the Seventh Circuit also held that when there was evidence of com-

petitors' complaints about a discounter to the manufacturer and response thereto, the question of whether there was a combination violative of Section 1 of the Sherman Act was for the jury to decide. *Id.* at 77,707.

The Seventh Circuit has recently reaffirmed the principles and reasoning of *Alloy International* in *CUSCO v. Certain-teed Products Corp.*, 1981 Trade Cases ¶ 63,714, at 77,802 (7th Cir. 1981). The court explained that although manufacturers have broad discretion in their dealings, "*Alloy International* and *Cernuto* recognize that this discretion is overstepped when: (1) a manufacturer terminates a dealer upon the request of another dealer and, (2) that termination is motivated by a desire to reduce or eliminate price competition." *Id.* at 77,807.[13]

A recent decision of the Second Circuit is directly contrary to the Third Circuit's holding that circumstantial evidence alone is insufficient to prove a § 1 Sherman Act conspiracy between a distributor and a supplier. In *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.*, 622 F.2d 1106 (2d Cir. 1980), the Second Circuit, affirming a treble-damage jury verdict, held that the trial court had properly denied defendant's motion for a directed verdict where there was *no* direct evidence of a conspiracy. *Id.* at 1110. While conceding that the indirect evidence adduced was "less than overwhelming proof of a conspiracy," the Second Circuit correctly recognized that the circumstantial evidence of a conspiracy and the evidence contradicting the proffered business justification created issues of fact for jury determination, and not for the reviewing court. *Id.* at 1110.

In *Beach Cinema, supra*, plaintiff theaters alleged that defendant film supplier had conspired with a competing theater chain to deprive plaintiffs of supplier's film. Defendant Fox

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[13] This reasoning would also be applicable to the situation where a supplier took action against a price cutter to raise its prices, by increasing its costs, such as in the instant case, changing Sweeney's hauling allowance. As this Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), any combination that tampers with price structures by raising, fixing, depressing, pegging or stablizing prices is engaged in unlawful activity which interferes with market forces.

asserted that it acted unilaterally in refusing to deal with plaintiffs, claiming a legitimate business reason of a $7500 debt owed to Fox by plaintiffs. The Second Circuit agreed that this business justification was controverted by evidence that there was no demand for payment until after Fox began acting against plaintiffs, that Fox informed plaintiffs of this "reason" after-the-fact, and that other theaters owed defendant more money. Similarly, in the instant case, Texaco's purported business justifications were contested by evidence that Sweeney was never informed of customer complaints nor warned against commingling, which was done by other distributors, that the alleged cost savings studies were created after-the-fact, and that Texaco refused to give any reason for its action at the time it terminated Sweeney's distributor agreement.

The Third Circuit's holding that something more than evidence of competitors' complaints and the supplier's responsive actions is required appears to be derived from the cases concerning the issue of whether a combination may be inferred from parallel behavior. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Interstate Circuit, Inc. v. United States, supra.* The present case is clearly not a "conscious parallelism" case because the conspiracy was not between competitors, but between a supplier and its distributors, and there was evidence of direct communication between the alleged conspirators. Moreover, even if this case were analyzed under a "conscious parallelism" framework, there still was sufficient evidence of a conspiracy violative of § 1 of the Sherman Act.

The Third Circuit, in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975), set forth two additional criteria, "plus factors," in conscious parallelism cases: acts contrary to the actor's self-interest; and motivation. The lower courts' finding of fact that the criteria were not met was an usurpation of the function of a jury. The courts' factual conclusion that Texaco did not act contrary to its economic interest when it changed Sweeney's hauling allowance was based upon a Texaco cost saving study which the panel majority

below mischaracterized as an "undisputed fact" (Appendix A, at p. 45). On the contrary, Sweeney vigorously challenged Texaco's self-interest claim and the relevance of this evidence.

Texaco introduced two cost studies, neither of which was contemporaneous with its decision to change Sweeney's delivery point. The first study, showing savings of less than $2200 a year, was made in 1966, four years prior to the change in Sweeney's hauling allowance. The second study, purporting to show a savings of $58,000, was prepared on the eve of trial in 1979. From the non-production of a contemporaneous cost study, the jury could have inferred that none existed and that Texaco's evidence was a camouflage for its real motivation. This inference could have been supported by the fact that in the year its distributorship agreement was terminated, Sweeney was Texaco's leading distributor in volume in the Southeastern Pennsylvania-New Jersey area from which Texaco derived substantial profits.[14]

As shown above, since the restrictive interpretation of the quantum and character of evidence required for jury consideration of a § 1 Sherman Act case adopted by the Third Circuit in this case is in serious conflict with the decisions of this Court and of the Second, Third, Seventh and Ninth Circuits and imposes an untenable standard of proof on antitrust plaintiffs, the Petition for Writ of Certiorari should be granted.

II. Denial Of Injunctive Relief On A § 2(a) Robinson-Patman Act Claim Was Improper Where A Seller Charges Different Prices, Based Upon An Admitted Phantom Event, To Competing Purchasers Who Perform Identical Functions.

The Third Circuit affirmed both the district court's order denying injunctive relief under Section 2(a) of the Robinson-

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[14] The Third Circuit's disregard of the fundamental role of a jury in such a determination is clearly contrary to this Court's decision in *Theatre Enterprises, supra* at 542. There Justice Clark affirmed that it is proper for the jury to decide the fact issue of what was in the actor's self-interest in determining the ultimate fact question of whether there was a combination in violation of Section 1 of the Sherman Act.

Patman Act, and its order directing a verdict for Texaco on Sweeney's § 2(a) damage claim, based upon the district court's conclusion *as factfinder* on the injunctive claim that Sweeney proved no violation of the Act. The court below thereby disregarded the district court's finding that Sweeney had produced *sufficient evidence* on its damage claim for a jury to find price discrimination by Texaco violative of the Act, and evaded a close review standard of proof regarding damages under the Robinson-Patman Act. Because the damage issue was crucial in granting the directed verdict, this will be discussed in Section III, *infra*.

The Third Circuit's decision that there was *no* discrimination in violation of § 2(a) of the Robinson-Patman Act as a matter of law should be reviewed by this Court because it (1) contradicts this Court's decisions in *FTC v. Morton Salt*, 334 U.S. 37 (1948) and *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945), (2) misinterprets the Second Circuit's decision in *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977), and (3) applies an unconstitutional standard in this case based on the size of purchaser. This Petition for Writ of Certiorari should also be granted because the decision below fails to apply the governing principles of the Robinson-Patman Act to the facts in this case and threatens the continued vitality of the Act in the Third Circuit.

In holding that Texaco's hauling allowance system did not discriminate in price between Sweeney and its competing distributors, the Third Circuit relied explicitly on the Second Circuit's decision in *FLM Collision Parts, supra*. That this was a misapplication of the law to the facts in this case is clearly evident from that decision. In *FLM Collision Parts*, Ford dealers received one price when functioning as a retailer, and a lower price when functioning as a wholesaler by selling to independent repair shops. The Second Circuit held that the Robinson-Patman Act permits a seller to offer *dual* prices to its customers when they perform *different functions in the line of distribution*

so long as they receive the identical allowance for each function. 543 F.2d at 1024, 1026. Further, the Second Circuit expressly indicated that its holding in *FLM Collision Parts* was case-specific:

> We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers . . . which has the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it.

Id. at 1027. In this case, the competing purchasers were all distributors of gasoline who performed the *identical* function for the seller, Texaco.

It has long been recognized that "basing point" systems and "phantom freight" charges are illegal, violating § 2(a) of the Robinson-Patman Act. *FTC v. Cement Institute,* 333 U.S. 683 (1948); *Corn Products Refining Co. v. FTC, supra; FTC v. Staley Mfg. Co.,* 324 U.S. 746 (1945). Based on those cases, Texaco's conduct in the present situation was illegal. In those cases, the purchasers were charged with excess freight; in the present situation, Sweeney was credited with insufficient hauling allowances. In those cases, the point of origination was fictional; in the present case, the point of destination is fictional. Nevertheless, the common factor in those cases and in this case is that there was no relation between the price charged and the actual cost of production and delivery.

In *FTC v. Morton Salt, supra,* this Court found price discrimination because the lower prices were available to all purchasers only in theory, and not in fact. 334 U.S. at 42. In this case, Texaco's hauling allowance gives equal treatment to its distributors only in theory, and not in actuality, because the allowance is based on an *illusory event* (hauling to the distributor's bulk plant) which Texaco *admits does not occur.*

The Third Circuit supports its holding that there is no discrimination in this case by the fact that "it was the distributors, not Texaco, who determine where to place their bulk plants, and it is the distributors, not Texaco, who decides which

retail stations they will supply." (Appendix A, at p. 57). If the Third Circuit's cursory reasoning were applied to the facts that existed in *FTC v. Morton Salt, supra.*, it would have found no discrimination. In *Morton Salt,* the seller's quantity discount formula appeared non-discriminatory on its face. The seller had no control over the size of the purchaser's enterprise, nor the quantity of salt each purchaser could buy and handle. Further, the discount differed only a few cents. However, in *Morton Salt* this Court did not examine the alleged discrimination in a superficial, theoretical fashion; instead, the seller's formula was scrutinized in terms of existent market reality, and found discriminatory.

The Third Circuit completely ignores the historically-evolved market realities in this case. Regardless of the location of their bulk plants, Sweeney and its competing distributors provide the identical function in the same market; yet, because their hauling allowances are based on a phantom event, the allowance as it exists has the effect of discriminating in price against competing purchasers.

Misinterpreting this Court's holding in *Morton Salt, supra,* the Third Circuit also concluded that the evidence in this case was insufficient because "(t)he record fails to show that small buyers, whom the act was primarily intended to protect, are disadvantaged by the formula." (Appendix A, at pp. 57-58). The court is reading a requirement of size into the Robinson-Patman Act without any legal precedent. No court has ever weighed the sizes of the favored and disfavored purchasers as a prerequisite to finding discrimination under the Act. Nor is there anything in the statute to support such an exclusionary interpretation, since the statute is not couched in terms of size of the purchasers. This attempt to read a size criterion into the Act, would violate the "equal protection" clause of the Fifth Amendment, because it would apply a different standard to large purchasers than to small purchasers.

Although the legislative history of the Act indicates that a primary concern was to protect small businesses, the broader

purpose was to protect *competition*. Discrimination in price against a large purchaser certainly may have anticompetitive effects, particularly when that purchaser is a strong competitive force in a market, as was Sweeney. Given this situation, Texaco used the hauling allowance formula as an instrument to discriminate against Sweeney. By reducing Sweeney's hauling allowance by half, and thereby increasing its costs, Sweeney was forced by Texaco to pay more than its competing distributors for the identical product in the identical market.

It is readily apparent that the Third Circuit's opinion in this case contravenes fundamental principles of the Robinson-Patman Act, in the statute itself and as enunciated by this Court. The Petition for Writ of Certiorari should be granted to prevent the emasculation of the Act in the Third Circuit and other circuits which may adopt this decision as precedent.

III. When There Is Proof Of Direct Damage To A Disfavored Purchaser As A Result Of A § 2(a) Robinson-Patman Act Violation, The Jury Should Be Permitted To Determine The Amount of Damages.

There is a clear schism between the Courts of Appeals on the standard of proof of damage required to be adduced in a § 2(a) Robinson-Patman Act case. A uniform rule is needed on this matter of great importance because the standard of proof adopted by many of the Circuits, including the Third Circuit, presents an impractical and insurmountable burden of proof on victims of discriminatory pricing practices. The decision below should be reviewed because the standard applied by the Third Circuit severely undermines private plaintiffs' right to redress injuries sustained by discrimination in price violative of the Robinson-Patman Act.

The trial court below directed a verdict against Sweeney solely on its finding that Sweeney had not produced evidence of injury from which the jury could determine damages. If the trial court had not relied upon the "consequential damage rule"

evolved from *Enterprise Industries, Inc. v. Texaco Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), Sweeney's Robinson-Patman claim for damages would have been submitted to the jury.[15]

The *Enterprise* rule, as adopted by several circuits[16], is that damages to a disfavored purchaser can be proved to the extent that it was injured because the favored purchaser, by using the discriminatory price difference, actually drew sales *or* profits from the disfavored competitor. In this case, the district court found that Sweeney did not meet this standard, since there was "no evidence of *how many customers* Sweeney lost to competitors as a result of the discrimination . . ." (Appendix B, at p. 142) (emphasis added). Instead, Sweeney introduced evidence that it was *directly* injured by the price discrimination as a result of the changed hauling allowances because Sweeney absorbed the increased cost, thus reducing its profits, and relied on the "direct damage rule" set forth in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945).

In *Elizabeth Arden, supra,* the Eighth Circuit held that where the costs flowing from the discrimination were absorbed by the disfavored purchaser, there was general or "direct" damages. The Court there reasoned that:

> . . . the result of the discrimination in the present case was to leave [Plaintiff] with a burden of expense in the handling of [Defendant's] products that [the competitor] was not required to bear. This unequal expense-burden which

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[15] The trial court held that Sweeney had presented sufficient evidence of the other requirements of proof under the Act for jury consideration: discrimination in price occurring in interstate commerce, which had anti-competitive effect. (See Appendix B, at p. 137).

[16] *See, e.g., Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), *cert. granted*, 101 S.Ct. 70 (1980); *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970 (1963); *Freedman v. Philadelphia Terminals Auction Co.*, 197 F.Supp. 849 (E.D. Pa. 1961), *aff'd*, 301 F.2d 830 (3d Cir.), *cert denied*, 371 U.S. 829 (1962).

> [Plaintiff] would not have had to bear if there had been no discrimination was clearly a direct business-damage . . .

150 F.2d at 996. This situation of absorbing the amount of the discriminatory overcharge was both the basis for the injury and the basis for computing damages. The Eighth Circuit also recognized that situations were possible under the Robinson-Patman Act where there would be no direct damages, and thus the rule would not be applicable to a case in which the alleged damages were only consequential. *Id.* at 996.

This distinction between direct damages and consequential damages was also acknowledged in *Enterprise, supra.* An analysis of Judge Hand's opinion indicates that the case did *not* hold that direct damages (absorption of profits) could never be the measure of damages in a Robinson-Patman case. In *Enterprise,* Judge Hand found that in *that* case there was *no* evidence that the plaintiff had absorbed the price difference, and he therefore refused to allow the amount of discrimination to be the measure of damages. 240 F.2d at 459. However, in his discussion of *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743 (1947), Judge Hand stated: "If that were true [absorption], the amount of the discrimination might well be a proper measure of the buyer's damages." *Enterprise, supra* at 459. This is in harmony with the "direct damage rule" of *Elizabeth Arden, supra,* relied on by Sweeney. Unfortunately, courts which have subsequently adopted the *Enterprise* rule have overlooked this congruity, and have instead interpreted the *Enterprise* rule to be the one and only standard for proof of damages.

The interpretation that the *Enterprise* rule is the exclusive standard of proof of damages under the Robinson-Patman Act is *not* supported by decisions of this Court. In *Perkins v. Standard Oil Co.,* 395 U.S. 642 (1969), this Court stated: "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Id.* at 648. Therefore, if a purchaser were the victim of a discriminatory price, he could show that he absorbed some or all

of the price difference, thereby depleting his capital (direct damages), or he could show that by passing on the price increase to his customers, he lost sales (consequential damages). Under the *Perkins* rule, one *or* the other must be proven.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) neither mandates nor affirms the *Enterprise* rule. *Brunswick* was a merger case under the Sherman Act in which this Court stated that the injury must flow from the violation and the injury must be an "antitrust injury." *Id.* at 489. There the plaintiffs claimed that defendant's acquisition had increased competition to plaintiffs' detriment, and they sought damages for the profits they would have received if competition had been reduced. In *Brunswick*, competition clearly was not harmed, only the competitor. As this Court stated, the purpose of the antitrust laws is to protect competition and not competitors. *Id.* at 488. Unfortunately, lower courts have taken that famous sentence out of context, and contorted it to mean that injury to a single competitor *cannot* show injury to competition. Basic economic reality refutes this shortsighted view. Clearly, price discrimination against a competitor can have severe anticompetitive effect in a market, particularly where there are few competitors, and where the injured competitor has been a dynamically-competitive and expanding business in the market, as was Sweeney.

The *Enterprise* rule, as interpreted by the Third Circuit, is a harsh and inflexible standard which imposes an impractical and insurmountable burden of proof of damage. It creates an enormous loophole for those who engage in discriminatory practices to escape liability and penalty for their wrongful acts. As was demonstrated in this case, exclusive application of the *Enterprise* rule results in a paradoxical situation where a party has sufficient evidence to show that it was a victim of discriminatory pricing practices and was damaged, but it has no legal redress because of an inability to prove damages with the requisite particularity. Sweeney has proof of loss from absorbing the higher costs as well as evidence from which a jury could deter-

mine with reasonable exactitude the amount of damages.[17] However, Sweeney did not have proof of lost customers nor detailed price movement studies of his competitors who were not discriminated against by Texaco.

The Herculean nature of the burden the *Enterprise* rule places on a victim of price discrimination is illustrated by the district court's statement:

> As long as *Enterprise* is the law of this circuit a plaintiff must show a specific, *competitor by competitor* breakdown of the damages he incurred as a result of the alleged discrimination before he can recover.

(Appendix B, at p. 145 n. 72). In effect, this was requiring Sweeney to prove a negative, i.e. that he lost sales and the amount of those lost sales. This burden is yet greater because this negative would have to be proved by direct evidence ascertainable only by obtaining and evaluating the complete financial, marketing and pricing records of his competitors. Perhaps in some product markets, price changes may be shown with relative ease. But the gasoline industry is surely not the only one where requirement of price comparisons of this magnitude creates an onerous and impossible burden on a Robinson-Patman Act plaintiff. The *Enterprise* rule, as interpreted and applied by the Third Circuit, provides no flexibility for adapting to the reality of a particular market as shown in a particular case.

In this case, it is apparent that the Third Circuit has adopted an extremely stringent interpretation of the *Enterprise* rule. In affirming the directed verdict below, the Third Circuit stated that the "consequential damages rule" is that "the illegal

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[17] Also, Sweeney tried to admit into evidence two exhibits which compared the hauling allowance of its competitors, and showed his profit for gasoline on a per-gallon basis, the gallons sold and the loss incurred. The court refused to admit these exhibits into evidence because they contained the combined profit figures for all three petitioners, and the court had granted summary judgment against petitioners Mission and Petroleum on their damage claim. See Section IV, *infra*.

discrimination can only be used to quantify damages if the plaintiff demonstrates that the favored purchasers lowered their prices *in an amount equivalent to the benefit they received.*" (Appendix A, at p. 53) (emphasis added).

This holding nullifies the "direct damages rule" and ignores market reality. More importantly, it imposes a requirement that the jury be able to calculate the amount of damages with mathematical certainty, which is contrary to this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

In this case, there was evidence of the amount of discrimination, i.e. the different costs charged Sweeney and the favored competing purchasers. There was competent evidence that Sweeney absorbed the price difference and of the amount absorbed. The "direct damage rule" should have been applied, and the case submitted to the jury. For these reasons, the Petition for Writ of Certiorari should be granted.

IV. Summary Judgment Against Indirect Purchasers Who Purchase On A Cost-Plus Basis Contradicts This Court's Decision In Illinois Brick.

The Third Circuit affirmed the district court's order granting summary judgment against petitioners Mission and Petroleum on their claims for damages under Section 1 of the Sherman Act and Section 2(a) of the Robinson-Patman Act. The Petition for Writ of Certiorari should be granted because this decision is contrary to the recognized exception to the indirect purchaser doctrine expressed by this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and adopted by the Third Circuit in *Mid-West Paper Products Corp. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

In *Illinois Brick, supra,* this Court held that indirect purchasers of a manufacturer were banned from suing in private antitrust suits under Section 4 of the Clayton Act, 15 U.S.C.

§ 15. In deciding *Illinois Brick*, this Court noted that the rationale behind *Hanover Shoe v. United Shoe Machinery Corp.* 392 U.S. 481 (1968) was equally applicable to plaintiffs and defendants. A major reason for the decision in *Hanover Shoe*, this Court explained, was "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the [indirect] purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." 431 U.S. at 725. Therefore, this Court held that offensive pass-on cannot be used *except* where "[t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." *Id.* at 736. One exception that this Court explicitly recognized in *Illinois Brick* is the situation where the indirect purchaser buys under a pre-existing cost-plus contract. *Id.* at 724 n.2,736.

In this case, petitioners Mission and Petroleum both bought Texaco gasoline from Sweeney under a cost-plus arrangement. Although neither Mission nor Petroleum had a written contract with Sweeney, they did have a pre-existing, binding oral cost-plus arrangement with Sweeney. Their cost-plus arrangement was noted in depositions and was shown in two exhibits introduced by Texaco during trial.[18] The trial court itself stated in its September 4, 1979 opinion: "Mission and Petroleum purchased Texaco gasoline from Sweeney on a cost-plus basis", citing Texaco's two exhibits.[19] To limit this Court's exception to the indirect purchaser doctrine of *Illinois Brick* to a written cost-plus contract would ignore the reasoning and purposes of that doctrine enunciated by this Court.

The fact that the district court's June 1, 1979 Order prohibited the use of the pass-on defense by Texaco in no way corrects the error in granting summary judgment against Mis-

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[18] The Third Circuit's cursory statement that neither Mission nor Petroleum purchased gasoline from Texaco (Appendix A, at p. 61) ignores this evidence.

[19] See Appendix B, at p. 159.

sion and Petroleum. These two petitioners, which are different entities than Sweeney, were precluded from participating in the trial and from demonstrating the extent that they, and not Sweeney, suffered damage. Review by this Court of this erroneous decision should be granted so that this Court's decision in *Illinois Brick* is not broadened beyond its purpose.

CONCLUSION

The issues presented are substantial and of great legal importance. For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted to review the judgments and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

I, Mitchell A. Kramer, attorney for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of February, 1981, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Randall B. Robinson, Esquire, Texaco, Inc., 2000 Westchester Ave., White Plains, N.Y. 10650, and to Ira Sacks, Esquire, Kaye Scholer, Fierman, Hays and Handler, 425 Park Ave., N.Y., N.Y. 10022, attorneys for Texaco, Inc., a corporation. Service by hand-delivery was made on Jane D. Elliot, Esquire, Duane, Morris and Heckscher at One Franklin Plaza, Philadelphia, PA. 19102.

It is further certified that all parties required to be served have been served.

This the 26th day of February, 1981:

MITCHELL A. KRAMER
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2468

EDWARD J. SWEENEY & SONS, INC., and
MISSION GAS OIL COMPANY, INC. and
PETROLEUM PRODUCTS CO.,
Appellants

v.

TEXACO, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 74-3299)

Argued August 6, 1980

Before: ALDISERT and SLOVITER, *Circuit Judges,*
and RAMBO, *District Judge.**

(Filed November 3, 1980)

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*Honorable Sylvia H. Rambo, of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The major question for decision in this appeal by unsuccessful plaintiffs in an anti-trust action is whether they established a prima facie case of a "contract, combination . . . or conspiracy in restraint of trade . . ." in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Sweeney, a wholesale and retail

distributor of Texaco fuels, and two of its wholesale customers attempted to prove that Texaco unlawfully conspired with other fuel distributors and retailers to fix the retail price of Texaco motor fuel. Determining that appellants had failed to introduce evidence from which a jury could infer the existence of a conspiracy, the district court directed a verdict in favor of Texaco.

The district court also directed a verdict against appellants on their claims that Texaco violated § 2 of the Sherman Act, 15 U.S.C. § 2, and § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). In addition, the district court dismissed damage claims against Texaco raised by Mission Gas Oil Company and Petroleum Products Company. The court granted Texaco's prayer for injunctive and declaratory relief against Sweeney concerning Sweeney's practice of misrepresenting non-Texaco fuel as Texaco fuel. Sweeney, Mission, and Petroleum Products appeal these adverse rulings. We conclude that the district court did not err and, therefore, we affirm.

I.

We need recite only those facts essential to this appeal because of the extensive elaboration already undertaken by the district court. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 478 F. Supp. 243, 249-251 (E.D. Pa. 1979). Appellant Edward J. Sweeney & Sons, Inc., is a wholesaler and distributor of Texaco motor fuels in Eastern Pennsylvania and Southern New Jersey. In addition to its wholesale business Sweeney owns several retail gasoline stations. Mission Gas Company, Inc., and Petroleum Products are distributors who purchase fuel from Sweeney. The defendant Texaco, Inc., refines and sells gasoline and other petroleum products.

After several years as a consignee and wholesaler for other companies, Sweeney became a Texaco wholesaler and distributor in 1958. In 1963 Sweeney and Texaco entered into the distributor agreement at the heart of this litigation. Part of the agreement provided that Sweeney would haul its own fuel. When it sells motor fuel to distributors, Texaco charges a price that includes

the cost of delivering the product to the distributor's bulk plant. If the distributor picks up fuel at Texaco's plant, however, as Sweeney did, it receives a discount or hauling advance. The discount equals the lowest amount it would cost Texaco to deliver the fuel from a designated distribution point to the purchaser's bulk plant by common carrier, contract carrier, or Texaco company truck. Texaco initially designated its terminal in Westville, New Jersey as Sweeney's pick-up point. Accordingly, Sweeney received a hauling allowance equal to the common carrier rate for trips between Westville and its bulk plant located in Pottstown, Pennsylvania.

Sweeney used the hauling allowance to its advantage. Between 1965 and 1970 Sweeney acquired several retail gasoline stations in addition to ones it already owned. The newly acquired stations were located within a twenty mile radius of Texaco's Westville, New Jersey, terminal. Sweeney picked up fuel in Westville and transported it directly to these stations. This practice enabled Sweeney to receive an allowance for hauling fuel from Westville to Pottstown, roughly fifty miles, while hauling it less than twenty miles. Receiving the greater allowance effectively lowered Sweeney's cost for gasoline which in turn allowed Sweeney to lower its retail prices.

Use of the hauling allowance was just one part of Sweeney's retail marketing strategy. A second major part was "no-frills" retailing. Prior to 1965, Sweeney's retail stations offered complete automobile repair and maintenance services in addition to fuel. Sometime in 1965 or 1966, Sweeney's stations began eliminating these services, becoming "gas and go" outlets. The lowered overhead at these stations allowed Sweeney to reduce its retail prices further. Unlike other discount outlets which sold gas under their own names, Sweeney's stations sold fuel under the Texaco name. Sweeney offered gasoline at a price between one and three cents lower than the price at which other retailers in the area offered major brand gasoline. After Sweeney adopted this no frills retail sales practice, its retail sales and profits increased steadily.

Sweeney's prosperity did not augur well with competing

Texaco retailers. Beginning in 1966, some of these retailers complained to Texaco that Sweeney's discount pricing was hurting their busineses. Sweeney contends that Texaco conspired with these retailers to terminate Sweeney's distributorship or to reduce its hauling allowance and thereby force Sweeney to raise its prices. Sweeney cites Texaco's actions in 1970 and 1971 as evidence of this alleged conspiracy.

The evidence disclosed that as early as 1966 Texaco had reviewed the status of Sweeney's hauling agreement. Texaco found that it could save at least $2,158 annually by supplying Sweeney from Macungie, Pennsylvania, rather than from Westville, New Jersey, due to Macungie's proximity to the Sweeney plant. When it learned of Texaco's consideration of a change to Macungie, Sweeney objected and Texaco postponed its decision on the matter.

By 1970, the economics of supplying Sweeney out of Westville had changed drastically. Instead of $2,158, Texaco's loss attributable to supplying Sweeney from Westville had risen to more than $58,000 annually. Texaco informed Sweeney in December, 1970, that it was changing Sweeney's supply point from Westville to Macungie under a provision in the hauling agreement permitting Texaco to terminate the agreement or to change the pick-up point. Nevertheless, Sweeney refused to go along with the change to Macungie. Texaco then notified Sweeney that it was terminating Sweeney's distributor and hauling agreements in sixty days, effective February 28, 1971.

After it received the termination notice, Sweeney attempted but failed to obtain an alternate source of supply. Sweeney then negotiated with Texaco. As as result of the negotiations, Sweeney's distributor's agreement was not terminated and the parties agreed on a compromise hauling arrangement on March 1, 1971.

Under the new hauling agreement, Sweeney continued to pick up at Westville until May 31, 1971, and received the allowance it has been getting for the distance from Westville to Pottstown. Thereafter, Sweeney picked up fuel at Macungie and

received a hauling allowance based on the Macungie to Pottstown rate. Texaco also agreed that after May 31, 1971, Sweeney could pick up fuel at either location, at Sweeney's option, although the hauling allowance for all purchases would be based on the Macungie to Pottstown trip. This agreement mitigated the effect of the change in the hauling allowance by permitting Sweeney to continue supplying its southern New Jersey stations from nearby Westville.

After this new hauling agreement became effective, Sweeney began delivering non-Texaco fuel to Texaco brand stations in trucks bearing the Texaco trademark. Texaco learned of Sweeney's commingling and conducted a thorough investigation of Sweeney's operations using Texaco security personnel. The investigation confirmed Texaco's suspicion of Sweeney's pervasive trademark violations.

On December 17, 1971, Daniel A. Doherty, Texaco's Manager for the Philadelphia Region, told Texaco's Vice President of Sales, United States, of his decision to terminate Sweeney's distributor and hauling agreements. Doherty based his decision primarily on Sweeney's trademark violations and misrepresentations. In addition, Doherty explained that Sweeney's stations failed to maintain Texaco's brand integrity, image, quality, and prestige standards. Sweeney's stations were the subject of an inordinate number of consumer complaints about service. Credit card users, a particularly valued segment of the market, complained of credit card irregularities at Sweeney's stations. Coupled with Sweeney's practice of representing non-Texaco fuel as Texaco fuel, this evidence of Sweeney's failure to meet Texaco's standards led Doherty to believe that Sweeney was damaging Texaco's valuable trademark and image.

Texaco notified Sweeney that effective February 29, 1972, it would terminate both the 1963 distributor agreement and the March 1, 1971, hauling agreement. Although Sweeney tried again to obtain an alternate source of supply, it was again unsuccessful. After various negotiations, Texaco agreed to supply Sweeney until it gave ten days' notice of its intention to discontinue Sweeney's supply. No termination notice has been given, and Texaco continues to provide Sweeney with fuel.

The present litigation followed these events. Sweeney charged that Texaco conspired in violation of §1 of the Sherman Act, 15 U.S.C. §1 with the dealers who complained about Sweeney's competitive practices. It also alleged that Texaco violated §2 of the Sherman Act, 15 U.S.C. §2, by attempting to monopolize the sale of Texaco fuel. Finally, Sweeney averred that Texaco discriminated against it in the price Texaco charged for fuel and thereby violated §2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(a). Mission Gas Oil Company and Petroleum Products Company, two of Sweeney's wholesale customers, joined in Sweeney's lawsuit. Plaintiffs sought damages and injunctive relief. Texaco counterclaimed against Sweeney seeking injunctive and declaratory relief from Sweeney's commingling practices, basing its claims on various state, federal, and common law provisions. The district court dismissed Mission's and Petroleum's damage claims on the ground that they were improper plaintiffs because they did not purchase fuel directly from Texaco. After the close of the evidence the district court directed a verdict denying all of appellants' remaining claims and granting Texaco's prayer for injunctive and declaratory relief. Appellants challenge these adverse rulings.

II.

The only § 1 contention before us is appellants' claim that certain Texaco dealers conspired with Texaco to have Texaco terminate Sweeney as a distributor or to reduce its hauling allowance.[1] Appellants' theory is that these retail dealers complained

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[1] Although Sweeney initially asserted antitrust damages based on the 1971 termination, it withdrew this claim during trial. App. at 1826a-27a; Transcript of Oral Argument at 12. Only the claim of damages based on the change in hauling allowance was before the court on the motion for directed verdict, and therefore only that claim is before us now. Nevertheless, we accept for purposes of argument that both the termination and the change in hauling allowance were parts of a single alleged conspiracy. The 1971 termination was before the court on plaintiff's claim for injunctive relief, with the court sitting as the trier of fact, and the court's denial of that relief is discussed in section V, *infra*.

to Texaco about Sweeney's practice of retailing gasoline between one and three cents below their price, and that as a result of their complaints Texaco reduced Sweeney's hauling allowance to the rate set in the March, 1971, agreement. Appellants contend that the retailers' acts of complaining and Texaco's reaction to the complaints constituted concerted action in restraint of trade. The district court determined that appellants failed to offer sufficient evidence to permit a reasonable inference that Texaco terminated Sweeney's distributor agreement or changed Sweeney's hauling allowance because of competitors' complaints. We find no error in this determination. Moreover, we note that even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence alone would not show the necessary concerted action.

Unilateral action, no matter what its motivation, cannot violate § 1. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072 (3d Cir. 1978); *Tripoli Co. v. Wella Corp.*, 286 F. Supp. 264, 266 (E.D.Pa. 1968), *aff'd*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970). By its terms, § 1 requires proof of a "contract, combination . . . or conspiracy." 15 U.S.C. § 1. We have noted that the statuatory language presents a single concept about common action, not three separate ones: " 'contract . . . combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action.' " *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-46 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)(quoting L. Sullivan, Law of Antitrust 312 (1977)).

To establish the existence of concerted action, appellants had to submit evidence from which a jury could reasonably infer that Texaco and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963); *United States v. Standard Oil Co.*, 316 F.2d 884, 890 7th Cir. 1963). Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference

of a common understanding drawn from circumstantial evidence: "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age." *William Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 743 n.15 (3d Cir. 1945). Nevertheless, appellants had the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation. *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1312 (3d Cir. 1975).

The necessary first step toward appellants' proof of a prohibited § 1 conspiracy was proof of a casual relationship between competitor complaints that Sweeney was selling Texaco gasoline several cents below their own price, and the reduction of Sweeney's hauling allowance. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979). The mere reception of complaints by Texaco would be insufficient to prove this causal nexus. Nor would it suffice to prove only that some Texaco employees who knew of the complaints were also the ones who decided to terminate Sweeney's distributor agreement and change its hauling allowance.[2] The evidence must permit the inference that the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of the minds." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). *See Klein v. American Luggage Works, Inc.*, 323 F.2d at 791.

Appellants claim that they submitted sufficient evidence to

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[2] There are special reasons for applying this precept to a case in which a manufacturer receives price cutting complaints from competitors of a particular customer. To permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute. As Professor Areeda has explained, many cut off dealers in this situation will be tempted to harass their former suppliers with treble damage suits. Recognizing the potential for harassment, courts should hesitate to scrutinize too closely the supplier's ambiguous refusal to sell. P. Areeda. Anti-Trust Analysis, 560 (2d ed. 1974).

allow an inference of illegal concerted action. They point to testimony that beginning in 1966 or 1967 and continuing through 1979 some lessees of stations owned by Texaco complained to the refiner that certain stations supplied by Sweeney were marketing gasoline two or three cents per gallon lower than their prices. To establish their point, appellants relied on the testimony of several witnesses, but especially that of James P. Rodden, Daniel A. Doherty, and Glenn B. Murray.

A.

Rodden is a tormer Texaco sales representative who left Texaco to become a partner of William D'Ippolito, a leading stockholder and managing officer in Sweeney and other petroleum products businesses. He testified that as early as 1966 or 1967 some Texaco retailers complained about pricing by stations supplied by certain Texaco distributors. Rodden explained that these complaints related both to stations supplied by Sweeney and to stations supplied by other Texaco distributors. App. at 927a-95a. He testified that he was not aware of any discussions within Texaco about changing Sweeney's hauling allowance in March, 1971, and that he did not discover the reduction until 1973. App. at 799a-801a.

Rodden testified that he "believed" Texaco changed Sweeney's hauling allowance because of the retailer complaints about the loss of volume at Texaco's retail stations. Rodden admitted, however, that his "belief" was just unsupported surmise, without factual basis. App. at 842a-46a. The district court determined that the surmise of Rodden, "cannot, as a matter of law, support a jury finding of a contract, combination, or conspiracy between Texaco and other Texaco dealers either in 1970 or 1971." 478 F. Supp. at 255. We agree. In our view, Rodden's testimony goes no further than merely identifying retailers complaints. We turn now to other possible evidence of concerted action.

B.

Appellants argue that proof of concerted action was also

forthcoming from the testimony of Daniel A. Doherty, the manager of Texaco's Philadelphia region. Appellants assert that Doherty made the actual decision to terminate Sweeney's distributorship, "basing his decision partially on Sweeney's marketing strategy." Appellants' Brief at 18.

Doherty's testimony provides no help to Sweeney's theory. On June 8, 1979, appellants introduced the following deposition testimony of Doherty:

> Q. Were you aware that Sweeney was a price-cutter in the area?
>
> A. I was aware that Sweeney was engaging in a marketing strategy where the principal attraction of those retail outlets that he supplied was primarily, if not exclusively, based upon posting a price generally lower than major brand price in the areas.

App. at 1162a.

> Q. What factors entered into your decision to terminate Sweeney as the distributor?
>
> A. Sweeney's marketing strategy that I observed and the consequences of it that I observed.
>
> . . . .
>
> Q. Is that the marketing strategy referred to previously?
>
> A. There [were] other elements of it.
>
> . . . .
>
> A. As a consequence of the kinds of retail operations that Sweeney apparently solicited and acquired wherein the . . . primary business builder of the locations was a low, highly competitive retail price, the outlets to a concerning if not alarming degree did not meet the standards of housekeeping, service, or service capability. In addition to that, we received continuing customer complaints from Texaco customers and motorist customers and, more alarmingly, the best class of customer that we had was being impacted

> very heavily, and that was our credit card customers, because my memory is that his retail outlets were involved in credit card irregularities and it was apparent that Sweeney's . . . marketing strategy, relied entirely on having the lowest or one of the lowest prices, which is entirely his prerogative, the prerogative of those people he serviced. But, the trend away from the prestige service that had been the hallmark and the objectives of Texaco retail marketing, certainly from my entire career, was clear, and was adversely impacting, in our opinion, on the entire brand integrity of Texaco in the area.

Id. at 1602a-03a.

On June 13, 1979, appearing in open court, Doherty stated during cross examination by Sweeney's counsel:

> Q. Now, did you discuss the fact Mr. Sweeney was a price cutter with Mr. Hicks, prior to Sweeney's termination?
>
> A. I made the point yesterday, Mr. Kramer, that I never regarded Sweeney as a price cutter because I knew nothing about Sweeney's pricing. I don't know what he sold his retail for, so I couldn't characterize him as a price cutter. I never have.
>
> . . . .
>
> Q. Now Mr. Doherty, isn't it a fact that at the time of your deposition you said that one of the factors among many . . . that entered into your consideration to terminate Sweeney was the pricing practices of the Sweeney supplied stations?
>
> . . . .
>
> A. No, sir.
>
> Q. So, your're still saying that pricing in your view had no effect on your decision?
>
> A. Yes, sir.

App. at 1593a, 1605a-606a.

Appellants suggest that this testimony provided the quan-

tum of evidence necessary to get their case to the jury. Appellants' best case is Doherty's deposition statement that Sweeney's distributorship was terminated because of Sweeney's marketing strategy. That strategy, Sweeney maintains, was, in Doherty's words, "based upon posting a price generally lower than major brand prices in the area." But Doherty immediately explained that he included other elements of the "marketing strategy and the consequences of it." He emphasized that Sweeney "relied entirely on having the lowest or one of the lowest prices, which *is entirely his* [*Sweeney's*] *prerogative, the prerogative of those people he serviced.*" *Id.* at 1162a (emphasis added).

Viewed in the light most favorable to the appellants, only three reasonable and permissible inferences relevant to Sweeney's lawsuit flow from this testimony. First, Texaco did not object to Sweeney's low prices. Pricing was "entirely" Sweeney's prerogative. Second, Texaco's concern ower Sweeney's marketing strategy grew out of Sweeney's failure to meet housekeeping, service, or service capability standards—practices contrary to "the prestige service that had been the hallmark and objective of Texaco retail marketing" — and resulting customer complaints. Third, these concerns led Doherty to the decision to terminate Sweeney's distributorship.

Appellants maintain that the jury should have been permitted to infer from his testimony that Doherty decided to terminate Sweeney because Texaco received complaints from Sweeney's competitors that Sweeney was underselling them. This inference is impermissible. In both his deposition and in court, Doherty testified that although he was generally aware of Sweeney's pricing policies, he did not consider these policies unacceptable except insofar as they adversely affected Sweeney's customer service. In his deposition he stated flatly that pricing was Sweeney's prerogative. Appellants would have the jury infer that Doherty's asserted explanation was mere pretense and that Doherty actually terminated Sweeney's agreement as part of an illegal scheme. Absent some evidence supporting appellants' theory, we will not assume Doherty lied about his reasons. The district court correctly prevented the jury from speculating on

the existence of a conspiracy on the basis of such meager evidence.

C.

Appellants also rely on Glenn B. Murray's testimony, arguing that Murray's belief "that Texaco had terminated Sweeney because of Sweeney's competitive abilities as against other Texaco retailers and wholesalers" supports their § 1 claim. Appellants's Brief at 17. An examination of portions of the record relied on by appellants discloses no evidence in support of this argument:

> Q. I take it from your testimony that you have no personal knowledge of why Texaco wanted to terminate Sweeney?
>
> A. [N]o direct personal knowledge, no.
>
> Q. Tell us what, if any, knowledge you do have, whether it is direct or indirect?
>
> . . . .
>
> A. Well, it would be just the general feeling that E. J. Sweeney and Sons had literally expanded their operation [to] the point where they were picking up product in Westville and delivering it virtually next door in some instances, well within ten miles, 15, 20 miles of the terminal, and being granted hauling allowances for [the] distance up to Pottstown. And, as a result, they were in a much better competitive position than others would have been.

App. at 1347a-48a.

We cannot conclude that Murray's testimony, alone, or in conjunction with that of others, made out a jury case of concerted action. Murray's testimony did not refer to complaints of price cutting or of Texaco's response to such complaints. His testimony, admittedly not based on personal knowledge, was entitled to little or no weight by the trial judge. The "general feeling" he expressed concerning Sweeney's competitive position

cannot support an inference of concerted action or buttress any inferences of concerted action drawn from other testimony.

Putting aside the testimony of Rodden, Doherty, Murray and the others on which appellants rely,[3] appellants have failed to show that Texaco's actions contradicted the refiner's economic self-interest. Speaking through Chief Judge Seitz, our court has isolated "two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior: (1) a showing of acts by defendants in contradiction of their own economic interests . . . and (2) satisfactory demonstration of a motivation to enter an agreement." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975) (citations omitted). *Venzie* sets forth one means of establishing a conspiracy circumstantially. Clearly by lowering the hauling allowance, Texaco acted in its self interest, and was not proceeding contrary to its "own economic interests." The change saved it $58,000 per year on sales to Sweeney. This undisputed fact negates an inference of concerted action that might exist if both factors of *Venzie* were satisfied.

Moreover, the record indicates that the complaints began in 1966, five years before the acts in question, and continued until 1979, eight years after Texaco altered the agreements with Sweeney. There is no evidence showing the frequency of the complaints or whether the frequency changed at any time. These facts militate strongly against a causal relation between the complaints and Texaco's actions. Furthermore, the change in Sweeney's hauling allowance was less than one cent per gallon.[4]

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[3] In addition to Rodden, Doherty, and Murray, appellants also relied on testimony of Paul B. Hicks, Texaco Vice President of Sales, United States, and Edward C. Enstice, Texaco assistant regional wholesale manager. Appellants' Brief at 17-18. At best, this testimony merely repeats other testimony showing Texaco knew of retailer complaints concerning Sweeney's pricing policies. Investigation followed the complaints, but the conclusion was that the practices were not objectionable. App. at 1053a, 1078a-80a, 1114a-1120a.

[4] Prior to June 1, 1971, Sweeney received an allowance of $.0146 per gallon. After June 1, 1971, the allowance was $.0069 per gallon, or a decrease of $.0077. App. at 309a, 497a.

It is difficult to accept appellants' assertion that an action affecting Sweeney's cost by a fraction of a cent was taken in response to complaints citing price differentials of several cents, even when taking into account the millions of gallons sold.

Appellants urge that *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), requires a different result. We agree with the district court that it does not. Appellants argue that *Cernuto* stands for the proposition that when a manufacturer terminates a distributor's supply because of complaints from other distributors concerning price cutting, these actions make out a § 1 claim without proof of concerted action. Appellants' Brief at 22-23. We reject this interpretation. *Cernuto* decided simply that cut-off distributors in these circumstances need not prove anti-competitive effects to prevail in a § 1 lawsuit. Such action "per se" unreasonably restrains trade. 595 F.2d at 170.

The question that appellants contend *Cernuto* resolved was not before the court. In *Cernuto*, the district court granted defendant's motion for summary judgment, concluding that the plaintiffs could not prove defendant's actions constituted an unreasonable restraint of trade. The district court, using Justice Black's formulation in *Northern Pacific Railroad Corp. v. United States*, 356 U.S. 1 (1948), observed that while the action did have a "pernicious effect" on competition, it was not devoid of "redeeming virtue." *Cernuto v. United Cabinet Corp.*, 448 F.Supp. 1332, 1334-37 (W.D. Pa. 1978). The manufacturer's decision actually enhanced competition among different manufacturers. Thus, the district court noted, the plaintiffs could not prove a necessary element of their case. Although this court rejected *Cernuto's* need to prove anti-competitive effects, we did not obviate a showing of "unity of purpose or common design and understanding," *American Tobacco*, 328 U.S. at 810. In summarizing the decision we said:

> *If Cernuto can prove at trial that United, Lappin and Famous conspired* to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a price related

> end, then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving kitchen cabinet sales in Western Pennsylvania. Of course, at trial the defendants may be able to demonstrate that the evidence does not at all conform to what plaintiff has alleged.

595 F.2d at 170 (emphasis added). *Cf. Theatre Enterprizes, Inc. v. Paramount Corp.*, 346 U.S. 537, 541 (1954) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the act entirely.").

We agree with the district court that aside from the evidence of complaints made to Texaco by other retailers, Sweeney introduced no evidence of a conspiracy between Texaco and its retailers or wholesalers. In the absence of evidence that Texaco decided to terminate Sweeney because of competitor complaints and evidence of such a conspiracy, it would have been improper for the court to allow the jury to speculate on the cause for Texaco's action.

D.

The teachings of the Supreme Court are clear on when a matter may be submitted to the jury:

> The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

Galloway v. United States, 319 U.S. 372, 395 (1943). A reviewing court applies the same standard to a decision by a trial judge granting a motion for directed verdict. The appellate court must consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions. If no reasonable resolution of the conflicting evidence and inferences therefrom could result in a judg-

ment for the non-moving party, the appellate court must affirm the lower court's decision. *See Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum and Chemical Corp.*, 579 F.2d 30 (3d Cir.), cert. denied, 439 U.S. 876 (1979).

The jury's role in our legal tradition probably represents modern America's unique characteristic in the trial of civil cases. Its role cannot be minimized, nor its importance dissipated one iota. Yet the limits of the jury's role must always be recognized. The jury translates as found fact a congeries of relevant evidence on controverted factual issues. The jury does not engage in the final stage of this process until the court makes the critical legal decision that there is sufficient evidence to submit to the jury for the purpose of resolving conflicts in the evidence or inferences permissibly drawn from the evidence, or both. In removing a case from the jury, the court undertakes the vital task of "protecting neutral principles of law from powerful forces outside the scope of the law — compassion and prejudice." *Rutherford v. Central Illinois R.R.*, 278 F.2d 310, 312 (5th Cir.), *cert. denied*, 364 U.S. 922 (1960).

The court's role is especially crucial when, as here, the plaintiff's case, and therefore the defendant's liability, is based solely on circumstantial evidence. The illegal action must be inferred from the facts shown at trial. Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts. The inferences that the court permits the jury to educe in a courtroom do not differ significantly from inferences that rational beings reach daily in informally accepting a probability or arriving at a conclusion when presented with some hard, or basic evidence. A court permits the jury to draw inferences because of this shared experience in human endeavors. *See generally*, McCormick, Handbook of the Law of Evidence 289-96 (2d edition 1972). Perhaps the only distinction between extracting factual conclusions from circumstantial evidence in daily life and in the courtroom is that a jury's act of drawing or not drawing an inference is preceded by a judge's instruction. The instruction serves to guide the jury through some process of

ordered consideration. The court informs the jury that it must weigh the narrative or historical evidence presented, making credibility findings when appropriate, and then draw only those inferences that are reasonable in reaching a verdict.

When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact under these circumstances is to substitute the experience of logical probability for what the courts describe as "mere speculation." *Galloway v. United States*, 319 U.S. at 395; *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d at 25.

Logicians describe one process of reaching an ultimate fact from insufficient basic facts as the *false cause or post hoc* fallacy. The fallacy consists of reasoning from sequence to consequence, that is, assuming a causal connection between two events merely because one follows the other. For this reason the fallacy is often referred to as that of *post hoc ergo propter hoc* (after this and therefore in consequence of this), an expression which itself explains the nature of the error.

Here, the district court properly concluded that the basic facts adduced at trial were insufficient to allow the jury to find for appellants. The basic record facts were that some of Sweeney's competitors complained that Sweeney's stations undersold them by one to three cents per gallon, that Rodden did not know but "guessed" Texaco acted to terminate Sweeney because of these complaints, that Murray surmised Texaco was evaluating Sweeney's ability to get long hauling allowances for short deliveries, and that certain consequences of Sweeney's marketing strategy not directly related to Sweeney's competitive position figured into Doherty's decision to terminate Sweeney. Faced with this scanty record, the district court properly removed the issue of concerted action from the jury. It determined that insufficient

narrative or historical evidence had been submitted to permit the conclusion that Texaco's decision was a reaction to the specific complaints received. Moreover, the record was devoid of proof of concerted action among Sweeney's competitors and Texaco. The court concluded that the jury could not infer this ultimate fact from the basic facts in evidence without engaging in pure *post hoc* guesswork. We will not fault the court for these determinations.

III.

The district court also directed a verdict for Texaco on appellants' claims that Texaco attempted or conspired to monopolize the Texaco gasoline market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. The court explained that "Sweeney has failed to produce any evidence from which a jury could find that Texaco gasoline constitutes a product market for § 2 purposes." 478 F.Supp. at 267. We find appellants' contentions on this issue devoid of merit.

First, we hold an antitrust plaintiff in an appeal to the theory advanced at trial. There, Sweeney represented, and properly so, that the focal point of any discussion of its § 2 damage claims is the issue of relevant market. By letter dated May 24, 1979, Sweeney agreed that

> if a court and/or jury in [*Sweeney v. Texaco*] does not determine that a relevant product market or submarket is limited to "Texaco gasoline," then Texaco has not violated Section 2 of the Sherman Act.

We will not permit appellants to repudiate that agreement. *See American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1246 (3d Cir. 1975) ("AMI will be bound by its own analysis in open court of the issues to be litigated.").

Moreover, the theory of Ninth Circuit cases cited by Sweeney to support its argument—*Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), and *Lessig v.*

Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)—was rejected by this court in *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975). *Coleman* expressly held that definition of the relevant market was critical in § 2 attempt cases, specifically repudiating the Ninth Circuit view that it is possible to find an attempt to monopolize without such proof. *Id.* at 1348 n. 17.

To establish that Texaco gasoline alone constituted a relevant market or submarket, appellants had to prove that Texaco gasoline was not considered reasonably interchangeable with other brands of gasoline and non-branded gasoline by a significantly large number of consumers. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 393, 395, 399-400 (1956); *Columbia Metal Culvert Co. v Kaiser Aluminum & Chemical Corp.*, 579 F.2d at 26-27. There must be evidence, for example, of "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325; *Columbia Metal*, 579 F.2d at 27. Appellants offered no such evidence.

The evidence mandates the conclusion that the range of commodities "reasonably interchangeable by consumers for the same purposes" includes all brands of gasoline and that there are no product submarkets. By Sweeney's own assertion, gasoline is a fungible commodity. Sweeney itself continually bought gasoline from other refiners. Moreover, uncontradicted testimony indicated that Sweeney's gas stations competed not only with Texaco stations, but also with other brand and non-brand stations. Similarly, the record shows that Sweeney competed with other wholesalers offering non-Texaco fuel. App. at 620a-31a, 735a-37a, 760a, 855a-56a, 916a-18a, 957a-62a. Paraphrasing the conclusion by Judge, now Justice, Stevens in *Mullis v. Arco Petroleum Corp.* 502 F.2d 290, 296-97 (7th Cir. 1974) (footnote omitted): "Under the kind of economic analysis employed by both the majority and the dissent in *United States v.*

E. I. duPont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264, plaintiff clearly failed to prove that sales of [Texaco] petroleum products in [the area in question] constitute a relevant market."

Appellants contend that the value of the Texaco trademark establishes Texaco gasoline as a separate relevant submarket. They also contend that because Texaco stations can only sell Texaco fuel a product submarket exists for them. Accepting these arguments would lead to the conclusion that every manufacturer of a trademarked product has monopoly power over that product. No legal precept stands for this proposition, as the Supreme Court has emphatically held:

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power of the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

United States v. duPont, 351 U.S. at 393 (footnote omitted). *See also, Columbia Metal*, 529 F.2d at 27 n. 11.

If, on the other hand, the relevant market is all motor fuel sold in the area of Sweeney's stations, Texaco could not monopolize that market by driving Sweeney out of business. The retail price of Texaco gasoline sold by Sweeney's competitors and wholesale prices of Texaco fuel were determined to a large extent by market conditions of supply and demand involving all brand and non-brand gasoline. Competition from other refiners and independent dealers would severely limit Texaco's ability to succeed. *See Coleman*, 525 F.2d at 1348-49.

Accordingly, we agree with the district court that appellants produced no evidence demonstrating that Texaco gasoline was not easily interchanged with other gasoline and constituted a separate product market. Nor can it be inferred that Texaco intended to monopolize the entire gasoline market in southern

New Jersey. The § 2 claim alleging conspiracy to monopolize cannot prevail because of appellants' failure to establish a conspiracy, as discussed above. Thus appellants' § 2 claim was properly removed from the jury's consideration.

IV.

Sweeney alleged violations by Texaco of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and asked for both damages and injunctive relief.[5] The district court directed a verdict against Sweeney on the damage claim, concluding that Sweeney had failed to prove damages. In its role as factfinder, the court found that Sweeney had not established its case for injunctive relief. The Robinson-Patman issue is therefore before us in two different contexts, the damage aspect reviewable by this court on the standard of review applicable to all directed verdicts, and the injunction aspect reviewable by this court on the standard for reviewing legal error. Because we agree with the district court's construction of the Robinson-Patman Act in denying Sweeney's injunction claim, and with its conclusion that Sweeney proved no violation of the act, we do not reach the issue of damages.[6]

A plaintiff seeking either injunctive or damage relief under the Robinson-Patman Act must demonstrate that the defendant

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[5] The Robinson-Patman Act claims asserted by Mission Gas Oil Company and Petroleum Products Company are discussed in section V, *infra*.

[6] The district court refused to submit Sweeney's claim for damages to the jury on the ground that Sweeney failed to establish compensable damages. It relied on *Enterprise Indus., Inc. v. Texaco Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). We adopted the analysis of *Enterprise* in *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830, 833-34 (3d Cir.), *cert. denied*, 371 U.S. 829 (1962). We agree with the district court that the amount of the illegal discrimination can only be used to quantify damages if the plaintiff demonstrates that the favored purchasers lowered their prices in an amount equivalent to the illegal benefit they received. *See Enterprise*, 240 F.2d at 459-60. Sweeney failed to prove that its competitors lowered their prices, and thus cannot rely on the amount of the alleged illegal discrimination to establish damages.

has discriminated in price against the plaintiff and in favor of at least one of the plaintiff's competitors. It also must prove that the discrimination "may . . . substantially lessen competition." As we read the district court's opinion, it employed these grounds, operating together, in denying Sweeney's claim for injunctive relief. Although the district court sat as factfinder on the injunction claim, its conclusion rested not on a factual determination,[7] but on a construction of the statute.

Although Sweeney has never clarified the theory underlying its Robinson-Patman Act claim, in essence it contends that by changing the gasoline pickup point from Westville to Macungie, Texaco effectively imposed a discriminatory price on it. Sweeney alleges discrimination by comparing the price charged it to two different prices: the effective price of gasoline to it before the change of pickup points and the effective price of gasoline to other distributors whose bulk storage facilities were located farther from their pickup points. Sweeney's claim is more confusing because it has not explained whether the attack is on the hauling allowance system as a per se violation of the Robinson-Patman Act, or on the application of the system to Sweeney. Neither of these alternative theories for recovery states a violation of the act.

Under the Robinson-Patman Act, price discrimination requires "at least two completed sales by the same seller at differential prices to different purchasers." S. C. Oppenheim & G. Weston, Unfair Trade Practices and Consumer Protection: Cases and Comments 816 (1974); *See Utah Pie Co. v Con-*

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[7] The court explicitly noted that it was not addressing, nor had Texaco submitted, a cost justification defense. 478 F.Supp. at n.3. It relied on facts on which the parties were in substantial agreement, *i.e.*, that Texaco chose the distribution point pursuant to a contractual provision allowing use of the point most economical to Texaco, App. at 158a, and that Texaco realized a cost savings by changing Sweeney's point from Westville to Macungie. Other issues relating to the switch, such as conspiracy with Sweeney's competitors and predatory intent, are considered in relation to the Sherman Act claims, *supra*, and fail for lack of sufficient evidence.

tinental Baking Co., 386 U.S. 685, 702 (1967). The proper comparison for determining whether a price discrimination has occurred is between the prices charged to two different customers. We therefore reject Sweeney's argument that it has shown improper discrimination merely by showing that Texaco charged it a different effective price at two distinct points in time.

Sweeney argues that the formula for calculating the hauling allowance, though available on equal terms to all distributors, resulted in price discrimination because the effective price of gasoline varied from purchaser to purchaser. The variations in price arose because Texaco calculated the hauling allowance based on the differing distances between each distributor's bulk plant and Texaco's pickup point, using the lowest rate from among common carrier, contract carrier, or Texaco delivery truck. Complications arose because distributors frequently did not travel the full distance, but instead delivered the gasoline directly from Texaco's pickup point to nearby retail stations. This practice allowed distributors, including Sweeney, to travel fewer miles than the hauling allowance compensated them for. The most advantaged distributors, therefore, were the ones with bulk plants far distant from the pickup point, but with retail stations close to the pickup point.

Sweeney's indictment of the hauling allowance system apparently concentrates on two separate aspects. First, Sweeney alleges that by changing its pickup point from Westville to Macungie, Texaco eliminated his locational advantage and put it at a disadvantage with respect to other distributors. Second, Sweeney alleges that the hauling allowance as calculated was inherently discriminatory, and should be replaced with a "rational" hauling allowance system or scrapped altogether in favor of uniform prices at the pickup point. We reject both arguments.

A.

Under our analysis, the first argument merges into the second. Sweeney does not allege, and introduced no evidence

to substantiate, that Texaco deviated from its hauling allowance formula by switching his pickup point from Westville, far from Sweeney's storage facility, to Macungie, much closer to his storage facility. We are faced, therefore, with a hauling allowance formula, uniform in structure and application, that produces differentials in the effective price of gasoline sold to Texaco distributors. Sweeney's first argument alleges no more than that the formula produced a higher effective price to him than to other distributors. The first argument cannot succeed unless we are persuaded that uniform application of the formula violates the act.

B.

The attack on the hauling allowance system assumes that such a system discriminates merely because it results in a different effective price to each distributor. Although tne Supreme Court has said that "a price discrimination within the meaning of that provision is merely a price difference," *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960), the business reality of distributing gasoline over a large geographic region militates against elevating this isolated passage to an all-inclusive definition.[8]

We are persuaded by the second circuit's reasoning in *FLM Collision Parts, Inc. v Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977), which supports Texaco's position that a uniform pricing formula

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[8] In *Anheuser-Busch*, the Court addressed a problem known as "primary-line price discrimination," in which Anheuser-Busch, a beer manufacturer, sold its beer at a lower price in the St. Louis market than it sold it in other places in the country. The FTC alleged price discrimination to the detriment of other beer manufacturers selling in the St. Louis market, and the Supreme Court agreed. The allegedly harmed parties in *Anheuser-Busch* were competitors of Anheuser-Busch, who would be affected regardless of whether Anheuser-Busch charged equal prices to all its customers in St. Louis. In this case, equal treatment of customers is the only issue because other gasoline refiners, competitors of Texaco, are not before the court.

applicable to all customers is not a price discrimination under the act. In *FLM*, Ford charged different prices to its parts customers according to the function, such as retail, wholesale, or repair, that each customer performed. In concluding that this practice was not a price discrimination under the Robinson-Patman Act, the court reasoned that the dual price was available, not only in theory but in fact, to all purchasers. It concluded that

> the Act . . . requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances. . . . This principle has been applied in cases which found no violation of § 2(a) in pricing plans which, though varying prices according to different terms of sale, were administered equally to all purchasers.

Id. at 1026 (citations omitted). We hold, therefore, that Sweeney has failed to establish that the hauling allowance formula discriminates in violation of the Robinson-Patman Act.

Our holding is not inconsistent with prior Supreme Court decisions that have found pricing formulas violative of the act. In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), the Court held that Morton Salt's quantity discount system violated the act because the largest discounts were actually unavailable to the great majority of Morton's customers. *Id.* at 42-43; *see also Mueller Co. v FTC*, 323 F.2d 44, 46 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). The Court emphasized that a major purpose of the Robinson-Patman Act was to eliminate the competitive advantage of a large buyer "over a small buyer solely because of the large buyer's quantity purchasing ability." 334 U.S. at 43. In the case before us, it is the distributors, not Texaco, who determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over those decisions; it calculates the hauling allowance solely on the bulk plant's location in relation to the nearest pickup point. On this record, we cannot conclude that Texaco's formula forecloses any distributor from an advantageous hauling allowance. The record also fails

to show that small buyers, whom the act was primarily intended to protect, are disadvantaged by the formula.

Nor does *Corn Products Refining v. FTC*, 324 U.S. 726 (1945), preclude the result we reach. Corn Products operated a delivered price system for glucose sold to all its customers throughout the midwest. The "base point" for its calculation of the delivered price was its plant in Chicago, although Corn Products actually delivered glucose from its Kansas City plant to customers near that plant. The result was a built-in favoritism, unjustified by the facts of delivery, for customers in the Chicago area. *Corn Products* differs from this case in an important respect. In that case, the manufacturer was utilizing two shipping points, but calculating its freight charges as if it were using only one. The result was that customers close to the Kansas City plant were arbitrarily deprived of the locational advantage similar to the one held by customers close to the Chicago plant. Instead, they were placed at a great disadvantage in an industry in which "differences of a fraction of a cent . . . [were] sufficient to divert business from one manufacturer to another. . . ." *Id.* at 742. In this case, all relevant allowances are calculated on mileage between the actual shipping point and the customer's bulk storage facility. The formula is therefore not discriminatory.

Sweeney responds with two arguments. First, it notes that customers of Texaco get the benefit of the allowance based on distance from their plant to Texaco's plant, but in reality rarely travel the full distance. Because Texaco is aware of the common practice of delivering gasoline to retail stations directly from Texaco's plant rather than from the bulk storage facilities, Sweeney argues, Texaco is in fact sanctioning discriminatory prices. Sweeney asks this court to mandate f.o.b. shipping point pricing to eliminate this abuse of the hauling allowance. In rejecting this argument, we rely on the teaching that the Robinson-Patman Act should not be construed "in a manner which runs counter to the broad goals which Congress intended to effectuate." *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). Sweeney's argument is apparently based on some perceived duty of a manufacturer to assure that uniform discounts are not

abused by customers. Even if we were persuaded that closer supervision of the hauling allowance would be better commercial practice, we would decline to impose a particular pricing strategy on a market as complex as the gasoline market merely because the current system may be imperfect.[9] Indeed, the record fails to support the proposition that competition in this market, as distinguished from a particular competitor, would benefit by our mandating the inflexible approach urged by Sweeney.

Alternatively, Sweeney would have us require Texaco to calculate, on a station by station basis, the actual mileage travelled by the distributors in making their deliveries. This requirement would impose a substantial administrative burden on Texaco, requiring it to adjust the allowance on a sale by sale basis. It would also eliminate Texaco's ability to base the hauling allowance on established rates since rates for the multiplicitous points, corresponding to each retail station, may not be readily available. Given the evenhanded application of the formula, we do not think the Robinson-Patman Act requires us to impose this burden on Texaco. Moreover, Sweeney has failed to demonstrate that Texaco's alleged failure to calculate its allowance in the most precise manner may have the substantial effect on competition required by the act. *See Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 n.6 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 721-22 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *M. C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976); *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277, 281 (7th Cir. 1966). Indeed, the allegations of adverse competitive effect are related only to the change in Sweeney's pickup point from Westville to Macungie. Sweeney failed to introduce evidence from which an inference could be drawn that the allowance formula per se has

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[9] Congress rejected an amendment to the Robinson-Patman Act that would have required f.o.b. shipping point pricing. *See Corn Products Refining Co. v. FTC*, 324 U.S. 726, 737 (1945).

a substantially adverse effect on competition, rather than merely an adverse effect on it, a competitor.

Sweeney's second response is that Texaco has deviated from uniform application of its formula. Only one instance is cited in which Texaco allegedly deviated from the formula. We need not address Sweeney's argument that this deviation constituted a violation of the act because Sweeney has failed to prove both that it was in any way affected by this deviation[10] and, if it were harmed, the extent of its damages directly related to this allegation.[11] We conclude, therefore, that Sweeney produced insufficient evidence to create a jury question, or to justify an injunction, on this issue.

Accordingly, the district court's order directing a verdict for Texaco on Sweeney's Robinson-Patman Act damage claim and the order denying its injunction claim will be affirmed.

V.

We have considered the other contentions presented by Sweeney, Mission Gas Oil Company, and Petroleum Products Company. We conclude there was no error in the choice, interpretation or application of legal precepts[12] by the district court and do not regard as clearly erroneous the district court's findings of fact in denying the plaintiffs' claim for injunctive relief. The plaintiffs failed to demonstrate that Texaco violated §§ 1

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[10] Undisputed evidence at trial indicated that Texaco increased Farm & Home Oil Company's hauling allowance after Sun Oil Company tried to induce Farm & Home to cease distributing Texaco gasoline and instead to distribute Sun gasoline. Even assuming a jury could reject Texaco's meeting competition defense under § 2(b) 15 U.S.C. § 13(b), with respect to this transaction, Sweeney neither alleged nor proved that it was harmed by this particular event.

[11] *See* note 6, *supra.*

[12] We specifically reject appellants' assertion of error based on the district court's refusal to admit evidence of Temporary Voluntary Allowances (TVA's). Texaco gave its wholesalers these allowances in order to assist Texaco retailers in meeting price competition from other retailers. Prior to trial, Sweeney conceded TVA's had nothing to do with the case. The district court correctly excluded TVA evidence.

and 2 of the Sherman Act. On this basis alone the plaintiffs' requests for injunctive relief were properly denied.

On June 1, 1979, the court granted, in part, Texaco's motion for partial summary judgment and dismissed Mission's and Petroleum's claims for damages. The district court's decision was correct. Neither of these companies purchased fuel from Texaco, but were Sweeney's customers. Consequently, under *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and *Klein v. Lionel Corp.,* 237 F.2d 13 (3d Cir. 1956), they cannot assert claims for damages under §§ 1 and 2 of the Sherman Act or § 2(a) of the Robinson-Patman Act.

The district court, sitting as trier of fact, concluded that Texaco was entitled to injunctive and declaratory relief on its counterclaims. Texaco alleged that Sweeney commingled Texaco gasoline with non-Texaco gasoline, sold non-Texaco gasoline and diesel fuel as Texaco products and used trucks carrying the Texaco brand to deliver non-Texaco fuel. Texaco asserted that it was entitled to relief on various grounds. Based on the evidence presented the court concluded that Sweeney's conduct violated §§ 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a), § 1 of the New Jersey Fair Sales Act, N.J.S.A. § 56:4-1, § 2(g) of the New Jersey Unfair Motor Fuels Practices Act, N.J.S.A. § 56:6-2(g), and the common law of unfair competition, and breached its distributor agreement. At trial Richard Sweeney repeatedly admitted commingling fuel, and the other evidence of infringement, unfair competition, and breach of contract is overwhelming and uncontroverted. The statutes are clear on their face, and their plain meaning is supported by the case law. We affirm the district court essentially for the reasons set forth in its opinion. 478 F.Supp. at 277-82.

Accordingly, we will affirm the judgment of the district court in all respects.

SLOVITER, *Circuit Judge,* dissenting.

It is an undisputed tenet in the allocation of the judge/jury functions that a trial court cannot pass upon the weight or credi-

bility of the evidence in ruling on a motion for a directed verdict. *Brady v. Southern Railway*, 320 U.S. 476, 479-80 (1943); *Burchill v. Kearney-National Corp.*, 468 F.2d 384 (3d Cir. 1972). *A fortiori*, the appellate court is bound by the same limitation on review. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-97 (1962). I dissent from the majority's affirmance of the directed verdict on plaintiffs' Sherman Act § 1 count for two reasons. I believe that both the trial court and the majority have arrogated to themselves the jury's function of determining which inferences can reasonably be drawn from the evidence before it. But my disagreement with the majority goes deeper than whether the trial court overstepped the permissible boundary in this case, admittedly an *ad hoc* determination. More significantly, I also disagree with the majority in its restrictive interpretation as to the quantum of evidence needed to bring action within § 1 of the Sherman Act. I believe the majority retreats from prior decisions of this court, disregards the realities of market behavior, and ignores the virtual impossibility of producing direct evidence of unlawful combinations. I fear that the majority's decision will unduly hamper plaintiffs in their ability to conduct this type of antitrust litigation.

I.

A.

Sweeney was a distributor of gasoline to discount stations, some of which he owned or operated, usually referred to in market jargon as "price-cutters." While price-cutters selling non-branded products are not well-regarded by their competitors, Sweeney's reputation among its competitors was even lower because it and the stations to which it sold price-cut a branded product, Texaco gasoline. Under the economic theory upon which the antitrust laws are based, Sweeney's competitors should have sought to meet its competition in the marketplace. As a practical matter, however, we know that displeased competitors may attempt to thwart a discounter's price competition by a much more direct route. They may seek to thrust at the jugular of that competition by complaints to their mutual supplier, in an attempt

to induce the supplier to take action to control or coerce the "offensive" market behavior or to cut the discounter out of the market altogether by terminating its source of supply.

The case law is replete with instances of such action by a discounter's competitors. For example, franchised General Motors dealers sought to avert the competition from discount outlets of General Motors cars by resorting to the "ultimate power" of the supplier, and enlisting General Motors' aid. *United States v. General Motors Corp.*, 384 U.S. 127, 136 (1966). Another illustration appears in *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F. Supp. 350, 354-55 (S.D.N.Y. 1978), where complaints from a franchised dealer of Uniroyal tires about price competition from a competing franchised dealer led to Uniroyal's decision to terminate the price-cutter.

Most such cases have been decided on the issue whether the circumstances warrant application of the *per se* approach, an issue not before us on this appeal. However, until now, there has not been any serious question in this circuit that the competitors' complaints to the supplier about the discounter's market behavior and the supplier's action in response thereto are sufficient to constitute the "combination"[1] necessary to bring the matter within the scope of section 1 of the Sherman Act. In *Cernuto v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), we recognized that when a manufacturer takes action at the behest of a customer, such action can no longer be considered unilateral and is therefore subject to the prohibitions of the antitrust laws. In *Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1069-70 (3d Cir. 1979), we held that allegations that Congoleum terminated plaintiff's foreign licenses "in response to" complaints by Congoleum's foreign licensees about plaintiff's

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[1] The majority's suggestion that "contract, combination or conspiracy" under section 1 of the Sherman Act is one concept, instead of discrete terms, typescript op. at 9, is simply wrong. It is refuted by the discussion of the Supreme Court in United States v. Parke, Davis & Co., 362 U.S. 29, 43-47 (1960), where the distinction between agreements and combinations was made.

excessive competition and to the foreign licensees' threats to terminate their own licenses stated a sufficient claim under the antitrust laws. Both cases were decided on the premise that action by the manufacturer in response to the customers' complaints would constitute the "combination" needed to meet the jurisdictional predicate of Sherman Act § 1. If that postulate had not been accepted, there would have been no point to our judgments returning the cases to the district courts for further proceedings.

Now, the majority, holding directly to the contrary, states "that even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence alone would not show the necessary concerted action." Typescript op. at 9. It affirms the district court which held that "evidence of competitors' complaints standing alone cannot support a finding of liability under § 1 of the Sherman Act." 478 F. Supp. 243, 255.

The majority cites no authority to support the proposition that complaints and responsive action cannot constitute a combination or conspiracy under the antitrust laws. The district court relied on four cases to support its acceptance of that proposition. For our purposes, central among the cases cited is this court's decision in *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963). In citing that case to support the proposition that something more is needed to create a combination than mere complaints and responsive action, the district court overlooked the fact that the *Klein* decision turned on the circumstance that there was no evidence that the manufacturer ever received the competitor's complaints, which were made to its sales representative and not directly to it. *Id.* at 791. Under that circumstance there could be no combination with the manufacturer. Thus, the court in *Carbon Steel Products Corp. v. Alan Wood Steel Co.*, 289 F.Supp. 584 (S.D.N.Y. 1968), another of the authorities cited by the district court in this case, erroneously relied on the *Klein* decision in rejecting the inference of conspiracy from the fact of customer complaints and the manufacturer's actions. *Id.* at 588. The other appellate court case relied on by the district court here, *Westinghouse Electric Corp. v. CX*

Processing Laboratories, Inc., 523 F.2d 668 (9th Cir. 1975), also contains no analysis of the principal issue which concerns us here, whether evidence showing complaints and responsive action constitutes a Sherman Act § 1 combination. In the *Westinghouse Electric* case, there were no complaints from plaintiff's competitors about its marketing practices. Instead, the court expressly noted that the calls from competing distributors were not complaints but were requests for a favorable price arrangement similar to the one Westinghouse had bestowed upon the plaintiff. *Id.* at 674. Hence, that case cannot serve as very persuasive authority for the proposition for which it was cited by the district court.

Instead, in the Ninth Circuit case where a fact situation similar to that presented here was considered, the court took a realistic view of the impact of complaints by competitors and the reaction of the manufacturer/supplier. In *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963), the court reversed the decision of the district court in granting a directed verdict after the plaintiff's evidence was presented to the jury. In that case, as here, plaintiff based its claim of conspiracy on the complaints of a competitor and the responsive action of the manufacturer in cutting off the price-cutter's source of supply. The court stated:

> It seems to us to be clear that if the facts here, as claimed by the appellant, are that Oranges as a competitor of Girardi, the price cutter, induced and participated in action which resulted in Girardi being cut off from a supply of this merchandise, then the case would be precisely within the rationale of United States v. Socony-Vacuum Oil Co., supra, for it is normally the competitor who is being hurt by price cutting who is likely to seek coercive action against the competitor who is hurting or likely to hurt him. We would think that a typical case of illegal conspiracy to fix prices would arise from the desire of one dealer to eliminate his price cutting competitor through concerted action with the manufacturer.

Id. at 200.

It is difficult to understand why the majority seriously contends that if a manufacturer reacts to complaints by its customers by cutting off the offending discounter or otherwise hampering his competition, this is not sufficient to establish a conspiracy or combination. A long and unbroken series of decisions has established that action which on the surface appears to be unilateral behavior can be considered to be part of a combination when viewed in light of the surrounding circumstances. *See, e.g., Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600 (1914); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939); *American Tobacco Co. v. United States,* 328 U.S. 781 (1946); *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

Given the undisputed evidence in this case of competitor complaints, it would be a fair inference that such complaints were designed to elicit some action on the part of Texaco. As Judge Pope stated in *Girardi.* "The very act of complaining carries the meaning: 'I want you to do something about it.' " 325 F.2d at 202. The district court here, however, refused to acknowledge that such complaints might constitute the foundation of a Sherman Act § 1 combination since "[i]t would be inequitable to hold that the mere receipt of a complaint creates an inference of a combination between the recipient and the complainant." 478 F.Supp. at 257. Plaintiffs, of course, do not suggest that *mere receipt* of a complaint is enough to turn a passive manufacturer into a conspirator. It is only when the manufacturer responds to such complaints by taking action that the *sine qua non* of a combination has been created by the addition of another party. Furthermore, the mere fact that the manufacturer/supplier took some action will not suffice to establish the requisite combination unless such action were taken in response to such complaints. However, if it were, then the components of a combination have been proven. *See United States v. Uniroyal, Inc.,* 300 F.Supp. 84, 90 (S.D.N.Y. 1969).

B.

The district court found, and the majority agrees, that plaintiffs failed to offer sufficient evidence to permit a reasonable inference that Texaco changed Sweeney's hauling allowance or terminated its distributor agreement because of competitors' complaints. Viewing plaintiffs' testimony in the light most favorable to them, which we must on reviewing a grant of a directed verdict, I believe a jury could have found that Sweeney's competitors complained about its pricing policies vigorously and in great number, that these complaints were of concern to Texaco management, and that Sweeney's pricing policies and market behavior played a part in Texaco's decision to change its hauling allowance and ultimately to discontinue its distributor arrangement.

In this case, unlike some of the others where a manufacturer/supplier has defended its actions on the ground of unilateral action, the evidence is undisputed that there were numerous complaints, that they were received by Texaco, and, even more significantly, that they came to the attention of the Texaco officials who made the decisions to take the actions against Sweeney. The majority opinion fails to note the extent or volume of such complaints. Such complaints were far from isolated. Nor did they stem only from an individual dissatisfied competitor. In fact, complaints about Sweeney's pricing policies by several statewide associations of service station dealers were the subject of discussion among Texaco officials. Furthermore, complaints about Sweeney were made directly to Texaco. Daniel A. Doherty, who in 1971 was the Regional Manager of Texaco's Philadelphia region and who made the decision to terminate Sweeney's distributorship, was aware of complaints from retailers and distributors concerning Sweeney's price-cutting tactics well before he made that decision. For example, he admitted receiving a copy of a memorandum written by Edward C. Enstice, Assistant Regional Manager, wholesale, of Texaco, stating that W. A. Fluhr of W. A. Fluhr, Inc., one of Sweeney's distributor competitors, had visited Enstice to complain that Sweeney's low prices were adversely affecting his business. Paul B. Hicks, Jr.,

Vice President of Sales, U.S., Texaco, who was consulted concerning the Sweeney termination was also aware prior to the attempted termination of complaints of other Texaco retailers about Sweeney's underselling. Carlos Leffler, Inc., a Texaco wholesaler, had complained in writing directly to Hicks by letter dated September 1971 about Sweeney's underpricing.

James P. Rodden was a former retail supervisor and marketing representative for Texaco in the South Jersey and Eastern Pennsylvania region during the relevant period, and in this capacity was in charge of 60 to 70 Texaco stations. He testified that beginning in 1967, numerous retailers had complained to Texaco about being undersold by nearby Texaco stations, which were supplied by Sweeney. Unlike cases where such testimony is vague and inconclusive, Rodden was able to identify seven such complainants. Moreover, he testified that in regular meetings attended by Texaco's district manager and the marketing staff, the marketing representatives proffered competition from Sweeney stations as an explanation for lost volume at some of Texaco's investment stations. Finally, Enstice, the Texaco official referred to above, also testified that in 1971, Texaco received complaints regarding Sweeney's pricing practices from Texaco retailers, wholesalers, and distributors. Enstice transmitted these complaints to R. W. Smithwick, Texaco's general manager of sales in its marketing headquarters. As a result, Smithwick subsequently travelled to Philadelphia to examine Sweeney's marketing area first-hand.

The majority concludes that there was no credible evidence from which a jury could permissibly infer that Texaco's actions were in response to these complaints. In drawing this conclusion, the majority excerpts some of the testimony on which plaintiffs rely and combs through it to see what weight or credibility can be attached to it. The pertinent issue, of course, is not what the majority deems to be the reasonable inferences that can be drawn from the testimony but what the jury believes to be the reasonable inferences that can be drawn from the testimony.

When viewed by the proper standard, I believe that a reasonable jury could have drawn the inference of responsive action.

One of plaintiff's witnesses, Glenn Murray, who significantly had no connection with either plaintiff or defendant (having left Texaco in 1973), testified to his belief that Texaco had terminated Sweeney because of Sweeney's competitive abilities as against other Texaco retailers and wholesalers. Murray, a Texaco employee since 1953, was close to the "center of the action," having been employed as the district sales manager of the Philadelphia district in 1971 and as assistant district sales manager prior to that time. Murray was responsible for "everything and anything" in the Philadelphia district and was thoroughly familiar with Sweeney's business. Murray's extensive experience at Texaco and knowledge of the realities of the way in which its business decisions are made lends credence to his conclusion that Sweeney's marketing strategy, and not customer complaints, was responsible for Texaco's actions. Certainly a similar inference by the jury was permissible, albeit not compelled. The majority's disregard of Murray's testimony because he "did not refer to complaints of price cutting," typescript op. at 15-16, is surprising in light of Murray's testimony that Texaco sales representatives complained to him that Sweeney's stations had a "pricing structure . . . lower than [Texaco's] own retailers were able to price. . . ."

Plaintiff also introduced the testimony of Doherty, the Texaco official who made the decision to terminate Sweeney's distributorship, who admitted that he was aware that Sweeney's attraction was "based upon posting a price generally lower than major brand price in the areas," that its outlets were locations with "a low, highly competitive retail price", that Sweeney's "marketing strategy" "relied entirely on having the lowest or one of the lowest prices", and that Sweeney's "marketing strategy" was among the elements which entered into his decision to terminate it. The majority places great stress on Doherty's assertion that Sweeney's pricing was his prerogative and that of the people he serviced. But the jury was entitled to discount the self-serving portion of Doherty's testimony (particularly in light of the fact that Doherty is still employed by Texaco) and to draw the inference that Texaco had capitulated to the pressure of Sweeney's competitors.

The testimony of these witnesses and the surrounding circumstances would support a jury's inference that Texaco acted in response to the numerous complaints it had received. To be sure, that was not the only inference permissible from the evidence. Texaco attempted to show that the motivation for its actions against Sweeney was the customer complaints it had received, and that Sweeney commingled Texaco's gasoline with other refiners' gasoline. But these are arguments directed to the jury, and the jury, acting as the reasonable voice of the community, must decide which explanations are the more plausible. I doubt that we would not be bound to sustain its decision, however it ultimately came out

The majority's statement that because the change in Sweeney's hauling allowance was less than one cent per gallon, it "is difficult to accept" Sweeney's claim that the change was taken in response to complaints citing price differentials of several cents, typescript op. at 17, is illogical. The amount of the reduction of Sweeney's allowance does not go to the issue of whether it was responsive to the competitors' complaints. Indeed, Texaco may have believed that some reduction of Sweeney's allowance on its part would permit it to assuage the complaints of the competitors while retaining the business of Sweeney. That Texaco may have wanted the best of both worlds does not foreclose the possibility that its action, in whatever form, was taken in response to the complaints it received. The majority's treatment of this fact patently demonstrates that it is usurping the jury's legitimate function.

The majority discounts the testimony of Rodden, Doherty and Murray which it cites in detail. Apparently it does so because none of them testified that they knew *as a fact* that Texaco took its actions against Sweeney in response to the competitors' complaints. I assume that the reference to "narrative or historical matters" in the learned discourse in Part II D of the majority's opinion is to the objective fact of such a causal connection, and that it is intended to contrast facts with inferences. But inferences are all that one can reasonably expect in such cases.

Although the majority purports to take cognizance of the difficulty of proving an antitrust conspiracy by direct evidence, the effect of its decision will be to require nothing less than direct evidence of a causal connection between Sweeney's competitors' complaints and Texaco's actions. The district court was explicit on this point, faulting plaintiff because "Sweeney never even attempted to introduce any evidence that Texaco either responded to the complainants or told Sweeney that it would take any action in response thereto." 478 F.Supp. at 257. It cannot be so naive as to expect that a sophisticated business concern like Texaco will have maintained records which make such a direct causal connection, or that its officers, well trained in the technicalities of the antitrust laws, will testify to that effect. The courts have recognized that "in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.* 368 U.S. 464, 473 (1962). *See also Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969). As Justice Black stated in a different but analogous context:

> The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. In this case petitioner may have had to prove her case by impeaching the store's witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 176 (1970) (concurring).

The issue of whether a combination may be inferred has been most directly presented in the cases where plaintiff has produced evidence only of parallel action. In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the Court affirmed a finding that parallel action by motion picture distributors in

responding to a demand by one of their leading motion picture theatre chains with identical and complex counteroffers permitted the inference of a conspiracy. On the other hand, in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), the Court affirmed a finding that parallel action by motion picture producers and distributors in refusing to grant a suburban theatre first-run features did not constitute a conspiracy in violation of the antitrust laws. What is significant about these seemingly inconsistent decisions for our purposes is that both cases were given to their respective juries so that the juries could determine the inferences to be drawn from the parallel behavior. In fact, in *Theatre Enterprises*, the Court specifically stated, "To be sure, business behavior is *admissible circumstantial evidence from which the fact finder may infer agreement.*" *Id.* at 540 (emphasis added).

II.

The majority's decision appears to be based on the alternative holdings that something more than competitor's complaints and manufacturer/supplier action is needed to show a Sherman Act § 1 combination or conspiracy, and that, in any event, the plaintiff did not provide sufficient evidence that Texaco's action was responsive to the complaints. Part I of this dissent dealt with the latter holding. Even if the majority and the district court are correct that "something more" is needed, a fair reading of the record discloses that there is sufficient evidence of "something more" to permit that issue also to go to the jury.

The search for "something more" stems from the line of cases where the plaintiffs have sought to have the trier of fact infer the requisite combination or conspiracy from mere parallel action, usually refusals to deal, when there is no direct evidence of combined action. See L. Sullivan, Antitrust § 110 (1977). This "plus factor", as it is sometimes called, has been used in the parallel action cases even in the absence of evidence of communication between the alleged conspirators to permit the infer-

ence of a combination from external factors.[2] Of course, in this case, there was direct evidence of communication, and therefore the requirement of a "plus factor" for that purpose is superfluous.

In any event, a sufficient "plus factor" can be found by evidence that the actions taken were in contradiction of the actors' own economic self-interest. *See Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975). This is the key to reconciliation of the Court's decisions in *Interstate Circuit* and *Theatre Enterprises*. As previously noted, in both of those cases the jury was permitted to decide the subsidiary question of what was in the actors' self-interest in determining the ultimate fact question of whether there was a combination.

In this case, the majority itself has decided that issue, stating that, "Clearly, by lowering the hauling allowance, Texaco acted in its self interest, and was not proceeding contrary to its' own economic interests. The change saved it $58,000 per year on sales to Sweeney." It continues, "This *undisputed fact* negates an inference of concerted action. . . ." Typescript op. at 16 (emphasis added). However, Texaco's claim that it acted in its own self-interest in changing Sweeney's hauling allowance was vigorously challenged by Sweeney. Texaco introduced only two studies calculating the savings Texaco would secure by designating Macungie, Pennsylvania rather than Westville, New Jersey as Sweeney's pick-up point. The first, showing a savings of about $2,200, was prepared in 1966. It is unlikely that this study, made some four years before Texaco changed the pick-up point and based on 1966 freight rates, was the basis of Texaco's decision in 1970. The second study, prepared on the

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[2] In the absence of explicit Congressional guidelines, the courts have been unwilling to hold that consciously interdependent action by firms in a oligopolistic market is an adequate substitute for the "contract, combination, or agreement" required by section 1 of the Sherman Act, although such action creates anticompetitive effects equivalent to those from an explicit combination.

eve of the trial at the request of Texaco's counsel, purported to show that Texaco would save $58,000 from a change in delivery point. It is self-evident that Texaco could not have relied on a 1979 study in making a 1970 decision. Texaco introduced no cost-saving studies that were contemporaneous with its decision to change delivery points, from which a trier of fact might conclude that none exist. Sweeney also argued that Texaco's failure to study the possibility of reducing its costs by changing the pick-up point of Sweeney's competitors suggests that cost saving was not Texaco's motivation. Certainly, a trier of fact was entitled to infer from the above that Texaco used the purported cost savings as a cover for its real motivation, which was to meet the persistent and pervasive complaints it had received about Sweeney's market action.

Even if Texaco had known in 1970 that it would save $58,000 by changing Sweeney's pick-up point, the conclusion is not inescapable that such a change was to Texaco's benefit. A change in Sweeney's hauling allowance would reduce the amount of gasoline that Sweeney sold, and thereby reduce Texaco's profits from Sweeney's purchases. Furthermore, it is not at all clear that the termination of Sweeney's distributorship was in Texaco's self-interest. Texaco does not contend that Sweeney was a fly-by-night operator. To the contrary, Sweeney has been a Texaco wholesaler and distributor since 1958 and, prior to the present controversy, its general relationship with Texaco was good, with Sweeney usually receiving the prompt payment discount on purchases from Texaco. In addition, Sweeney was very successful in its business, to the benefit of both itself and Texaco. It won a contest sponsored by Texaco in 1968 for having the greatest increase in gallonage among area wholesalers. 478 F.Supp. at 249. And in 1971, the very year Texaco terminated Sweeney's distributorship, Sweeney was Texaco's leading distributor in the Southeastern Pennsylvania/Southern New Jersey area, purchasing over 28 million gallons of gasoline.

Under the majority's view of the law, there are two factual issues critical to the ultimate finding as to whether there was a combination or conspiracy in this case. One is whether Texaco acted in response to Sweeney's competitors' complaints. The

other is whether Texaco's actions were consistent with its self-interest. The majority decides both issues adversely to plaintiffs, thus invading the province of the jury.

III.

In its decision that plaintiffs had not produced sufficient evidence to permit the inference of a combination or conspiracy, the majority has failed to make the necessary analytic distinction between conduct which constitutes a combination or conspiracy, on one hand, and combinations or conspiracies which violate the antitrust laws, on the other. Underlying the majority's out-of-hand rejection of the possibility that there was a combination in this case may be its belief that such conduct does not or should not violate antitrust laws. However, that confuses two separate issues: whether there was conduct that can fairly be considered to have been joint or concerted, and the standard by which such conduct should be evaluated for purposes of antitrust liability. Consideration of whether antitrust liability should be imposed for business decisions made by a manufacturer in arranging its distribution structure is appropriate in determining the standard by which such action, if joint, should be judged. There may be ample basis for arguing that such vertical arrangements do not always lend themselves to the *per se* approach, but must be evaluated in the context of the effect on competition. This issue was considered by Judge Adams in writing for this court in *Cernuto, Inc. v. United Cabinet Corp., supra.* In holding that the *per se* approach was warranted under facts analogous to those alleged here, he wrote, "When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be." 595 F.2d at 168. He continued, "if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint,

the desired impact is horizontal and on the dealer, not the manufacturer, level." *Id.* His discussion recognizes that ostensibly vertical and unilateral action may, on closer analysis, have precisely the anticompetitive impact which the Sherman Act is designed to avoid. I do not profess to decide whether Texaco's actions in this case fall within that mold. That was, of course, the ultimate question which the jury was precluded from deciding by the directed verdict.

In a recent en banc decision of this court in another case alleging an antitrust conspiracy, we reversed the action of the district court which had granted a directed verdict based on its conclusion that the only activity which plaintiff proved was unilateral. *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council,* 609 F.2d 1368 (3d Cir. 1979). We reiterated that looking at all the circumstances, the jury could have found the agreement which the district court was unwilling to infer. In *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20, 32-35 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978), we reversed the entry of a directed verdict in another antitrust case where the district court had also determined there was inadequate evidence to allow a jury to find the requisite conspiracy. We noted that the evidence on which the district court relied was challenged, and hence was for the jury. Implicit in these decisions is the recognition that a mechanistic search for direct evidence of a combination diverts consideration away from the more significant issue, which is the appropriate treatment of such conduct under the antitrust laws.

Certain statutes, such as those designed to produce equality or opportunity to minorities, women, retarded persons, on one hand, and those designed to insure an open economic system for all firms in the market, on the other hand, stem from conscious congressional policy judgments about the way in which our society should be ordered. Courts can, but should not, frustrate those public policy judgments by engaging in judicial interposition through the imposition of technical obstacles to achievement of the legislatively mandated goals.

The need to show that defendants' actions were part of the combination of conspiracy which falls within § 1 of the Sherman Act must be approached realistically, with an understanding of the various threads from which the fabric of business decisions are woven. If we are unwilling to allow the jury, which brings the community's experience to the fact finding process, to exercise its own judgment in making the reasonable inferences from the evidence, we have unduly, and I think unwisely, restricted its function in antitrust cases.

APPENDIX B

EDWARD J. SWEENEY & SONS, INC.,
Mission Gas Oil Company, Inc., and
Petroleum Products Company

v.

TEXACO, INC.
Civ. A. No. 74-3299.

United States District Court, E. D. Pennsylvania

Aug. 31, 1979.
On Injunctive Relief Sept. 4, 1979.

Gasoline distributor and retailer brought antitrust action against oil company. Oil company counterclaimed for breach of distributor agreement and infringement of trade names. An oil company's motion for directed verdict, the District Court, Cahn, J., held that: (1) there was no showing of either vertical or horizontal price maintenance agreement; (2) there was no showing of injury to the wholesale-retailer as the result of any price discrimination; (3) there was no showing of any monopolization or attempt to monopolize; (4) distributor-retailer had violated its distributor agreement by commingling other gasoline and selling it under the oil company's trade name; and (5) oil company was entitled to injunctive and declaratory relief with respect to those violations.

Order accordingly.

1. Federal Civil Procedure—2721

In view of fact that case was complicated, court would not award defendant reimbursement of expenses occasioned by plaintiff's change of theory of damages.

2. Federal Civil Procedure—2142, 2148, 2152

To decide motion for directed verdict, trial judge must analyze all of the evidence presented by the party opposing the motion, reviewing that evidence in light most favorable to that party, and making all inferences in its favor; trial judge cannot

pass on either the weight or the credibility of the evidence but rather must leave to a jury the task of evaluating contradictory evidence and drawing inferences therefrom. Fed. Rules Civ. Proc. Rule 50(a), 28 U.S.C.A.

3. Federal Civil Procedure—2142

On motion for directed verdict, trial judge retains power to decide whether the evidence, when properly reviewed, would support a jury verdict in favor of the party opposing the motion; that party must have introduced more than a scintilla of evidence from which the jury could find in its favor; it must have introduced sufficient evidence to support a jury verdict in its favor; if a reasonable jury could not find that the party opposing the motion for directed verdict had proved its case by a preponderance of the evidence, trial court must direct a verdict against it. Fed.Rules Civ.Proc. Rule 50(a), 28 U.S.C.A.

4. Monopolies—28(8)

Party claiming a conspiracy in restraint of trade need not produce direct evidence of a conspiracy to survive a motion for directed verdict. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc. Rule 50(a), 28 U.S.C.A.

5. Monopolies—17(1.10)

If established, conspiracy on the part of oil company to fix the retail price of its gasoline would be an unreasonable restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies—28(7.5)

Evidence that some competing retailers had complained to oil company that plaintiff retailer's policy of discount pricing was hurting their sales and testimony by a former employee of the oil company that he felt that the oil company had terminated the retailer because of the retailer's pricing policy was insufficient to support a finding of contract, combination, or conspiracy between oil company and other retailers to fix the retail price of the oil company's gasoline. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies—17(1.10)

If shown, combination between oil company and its retailers to fix the retail price of gasoline would effect a "horizontal restraint" of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

See publication Words and Phrases for other judicial constructions and definitions.

8. Monopolies—28(7.5)

Evidence of competitors' complaints to the defendant concerning the plaintiff's pricing policies cannot support a finding of liability under section 1 of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S. C.A. § 1.

9. Monopolies—28(7.5)

Mere receipt by defendant in antitrust action of complaint from one of plaintiff's competitors concerning actions taken by the plaintiff does not create an inference of a combination between the defendant and the complainant. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Monopolies—28(7.1)

To succeed on a claim of vertical price-fixing or retail price maintenance, plaintiff must prove that the manufacturer had a program of resale price maintenance, that it sought the aid of the plaintiff's competitors in enforcing that program, and the actions towards plaintiff were designed to secure compliance with the desired resale price. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. Monopolies—12(1.16)

Unilateral action by a manufacturer does not violate the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Monopolies—28(7.1)

In order to show liability for resale price maintenance, plaintiff must establish the announcement of a suggested retail

price and procurement of competitors' assistance in insuring compliance with that price. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

13. Monopolies—28(6.10)

In the absence of any allegations that oil company had any announced retail prices, retailer could not establish a claim of retail price agreements on the part of the oil company. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

14. Monopolies—28(7.5)

Evidence that other retailers complained to oil company about plaintiff retailer's pricing policies did not show that the oil company took any affirmative action to insure adherence to any particular resale price and thus was insufficient to show retail price-fixing by the oil company. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

15. Federal Civil Procedure—2126, 2610

Standards for deciding motion for directed verdict and judgment notwithstanding the verdict are identical.

16. Monopolies—17(1.8)

Jury's ability to infer that defendant had an anticompetitive purpose in taking the challenged action is immaterial; as long as the defendant acted without soliciting aid of any other entity, its motives are irrelevant with respect to claim of resale price maintenance. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

17. Monopolies—17(1.10)

Hauling agreement between oil company and distributor-retailer under which retailer which picked up the gasoline from the oil company's refinery received a hauling allowance was not, as revised to provide a hauling allowance based on pickup of gasoline at another refinery, an agreement in restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

18. Monopolies—28(7.5)

Plaintiff in antitrust action cannot establish the existence of a combination or conspiracy in restraint of trade merely by establishing the existence of an otherwise lawful agreement. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

19. Monopolies—28(7.3)

Testimony offered by former employee of oil company to the effect that he believed that the oil company had terminated its relationship with one distributor because of that distributor's pricing policies was admissible to show the oil company's alleged motives for terminating the distributor but was not relevant to the existence of a conspiracy to reduce that distributor's hauling allowance. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

20. Monopolies—12(1.6)

Anticompetitive motivation, without more, does not violate the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

21. Monopolies—17(2.10)

Even if oil company officials decided to terminate relationship with distributor because of distributor's pricing policies and discussed the termination amongst themselves, the oil company would not have violated section 1 of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

22. Monopolies—28(7.5)

Evidence was insufficient to show the existence of a vertical conspiracy between oil company and other retailers to terminate relationship of one dealer because of its refusal to adhere to an alleged pricing policy. Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1.

23. Monopolies—28(7.1)

To establish a claim of monopolization or attempted monopolization, plaintiff must show that the defendant intended to

acquire or maintain power in a relevant market, that it sought to do so by engaging in exclusionary practices, and, in the case of attempt, that it had a dangerous probability of succeeding. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

24. Monopolies—28(7.4)

Evidence was insufficient to show that Texaco gasoline comprised a separate market which that oil company could attempt to monopolize. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

25. Monopolies—12(1.3)

Defining the boundary of the relevant product market is the first step in determining whether defendant has attempted to create a monopoly. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

26. Monopolies—28(7.5)

Existence of a trademark for major oil company's gasoline did not provide the necessary evidence of the existence of a separate market for that gasoline in action for attempted monopolization. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

27. Monopolies—28(7.5)

Evidence that some competing retailers complained to oil company about plaintiff retailer's pricing policies and that a former employee of the oil company believed that the termination of the relationship with the plaintiff retailer occurred because of that retailer's pricing policies was insufficient to show a conspiracy between the oil company and other retailers to monopolize gasoline sales. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

28. Trade regulation—929

To succeed on a Robinson-Patman claim, plaintiff must prove that there was a difference in the price charged him and his competitors for a particular item at a particular time, that at

least one of the purchases occurred in commerce, that the discrimination could injure competition, and that he was injured as a result of the discrimination. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

29. Trade Regulation—918

Functional discounts do not comprise part of the price for Robinson-Patman Act purposes; differences in them are not forbidden. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

30. Trade Regulation—918

In view of evidence of instances where oil company knew distributors were not hauling their gasoline to the place upon which their hauling allowance was based, the hauling allowance, which supposedly represented a discount to the dealer for the cost which oil company would have had to pay to deliver the gasoline from its refinery, was not a functional discount for Robinson-Patman Act purposes. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

31. Trade Regulation—932

For purposes of deciding motion for directed verdict on behalf of defendant in Robinson-Patman Act action, court would assume, in view of disputed questions of fact, that a jury would find that the plaintiff was correct on the issue of whether one of the purchases occurred in commerce. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

32. Trade Regulation—913

As the largest of the oil company's distributors in the area, plaintiff's price increases could allow other distributors to do likewise so that there could be an injury to competition from any Robinson-Patman Act violation by the oil company directed at

the plaintiff. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

33. Trade Regulation—929

It was not sufficient for plaintiff to establish price discrimination in order to succeed on its claim under the Robinson-Patman Act on the theory that the amount of discrimination could serve as the basis in measure of damages, thus showing injury. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

34. Trade Regulation—931

The amount of discrimination by seller is not the measure of damages in a price discrimination action. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

35. Trade Regulation—929

In the absence of any evidence as to how many customers gasoline retailer lost to competitors as a result of alleged price discrimination by oil company, gasoline retailer failed to provide a basis upon which a jury could determine the extent of any injury which the retailer suffered as a result of any price discrimination and thus failed to prove a case under the Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

36. Trade Regulation—929

Testimony that two retailers bought from one of distributor's competitors on occasions because that competitor could give them a better price than plaintiff distributor could was too general and inconclusive to form the basis for a jury determination of the amount of damages suffered by the plaintiff distributor as a result of any price discrimination by the oil company and was thus insufficient to establish the existence of injury required to succeed on a claim under the Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

37. Trade Regulation—931

Competitor-by-competitor breakdown of the damages which plaintiff has incurred as a result of alleged price discrimination must be shown before the plaintiff can recover. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

38. Federal Courts—17

Where the facts involved in the state law unfair competition and breach of contract claims and those involved in the Lanham Act claims were not only arising from a common nucleus but also were identical, court had pendent jurisdiction over the state claims.

39. Contracts—316(1)

Where oil company objected to breach which occurred when retailer sold other products under the trademark of the oil company and then terminated the distributorship agreement and never reinstated it but rather continued to supply gasoline to the retailer on the basis of an informal agreement and where, for six years, oil company had no choice but to supply the retailer with gasoline pursuant to federal regulations, the oil company had not waived its claims of breach of the distributor agreement by the sale of other products under the oil company's trademark.

40. Declaratory Judgment—143

Where oil company originally sought damages because of retailer's breach of distributorship agreement and violation of Lanham Act, oil company's subsequent agreement to limit its damages claim to the amount of any judgment entered against it on the retailer's antitrust claim did not vitiate its breach of contract claim; oil company, which was seeking only declaratory and injunctive relief, needed only to show that a breach had occurred and that continuation of the breach would result in harm to it. Lanham Trade-Mark Act, §§ 32(1), 43(a), 15 U.S.C.A. §§ 1114(1), 1125(a).

41. Contracts—312(2)

Trade Regulation—432, 873.5

Action of gasoline retailer in selling other products under oil company's trade name constituted a breach of the distributor agreement with the oil company and a violation of Lanham Act, the New Jersey Fair Sales Act, the New Jersey Unfair Motor Fuel Practices Act, and the common law of unfair competition. Lanham Trade-Mark Act, §§ 32(1), 43(a), 15 U.S.C.A. §§ 1114(1), 1125(a); N.J.S.A. 56:6–2(g), 56:41–1.

42. Trade Regulation—873.5

Actions to restrain violation of the New Jersey Unfair Motor Fuel Practices Act are not limited to suits against retail dealers. N.J.S.A. 56:6–2(g), 25.

43. Contracts—312(1), 321(1)

Trade Regulation—508

Where oil company agreed to and did provide retailer with gasoline carrying the oil company's brand, fact that some of that gasoline was refined by other companies did not show that oil company breached its agreement with the retailer or that it acted in pari delicto with the retailer so as to preclude it from recovering for breach of distributor agreement and Lanham Act violation when the retailer sold gasoline, which it obtained from others, under the oil company's trade name.

44. Trade Regulation—92

Owner of the trademark has the right to decide what products are to be marketed under its trademark irrespective of whether it takes any action beyond selecting them.

45. Declaratory Judgment—346, 347

Evidence that oil company and retailer had been at loggerheads for close to ten years, and that, if oil company were to obtain a declaratory judgment that retailer had violated its distributor agreement and various trademark laws, the oil company

might obtain some rights under the Petroleum Marketing Practices Act demonstrated that the oil company was entitled to declaratory relief with respect to its claims of breach and infringement despite a claim that there was no case or controversy between the parties. 28 U.S.C.A. § 2201; Petroleum Marketing Practices Act, § 102(c) (1), 15 U.S.C.A. § 2802(c)(1).

46. Trade Regulation—873.5

Violations of distributor agreement and trademark infringement by gasoline retailer over a period of at least five years, including times after the filing of lawsuit challenging those practices showed a sufficient threat of recurrence of the practice to entitle oil company to injunction prohibiting the retailer from commingling the oil company's gasoline with other gasoline and selling all that gasoline under the oil company's trade name.

47. Injunction—57

Evidence showed that, if retailer continued to sell, under the trade name of a major oil company, gasoline obtained from other sources, oil company would be greatly harmed whereas, if the retailer did not do so, it would suffer no harm as a result of an injunction, so that injunctive relief against the practice was proper.

On Injunctive Relief

48. Trade Regulation—930

Fact that court had directed verdict for oil company on retailer's Robinson-Patman claims because the retailer had failed to make the requisite showing of injury did not preclude the retailer from obtaining injunctive relief under the Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

49. Trade Regulation—914

Action of oil company in entering into agreements with its distributor which provided that the oil company could either deliver the product to the distributor at its own expense or allow

the distributor to pick up the product at whatever point the oil company designated, giving the distributor an allowance for assuming the cost of hauling the product to its bulk plant, did not constitute price discrimination; similarly, its change of one distributor's pickup point, with a related reduction in the hauling allowance, did not violate the Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

50. Trade Regulation—921

Gasoline retailers which purchased gasoline from distributor on a cost-plus basis were not purchasers from the oil company within the meaning of the Robinson-Patman Act. Clayton Act, § 2(a) as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

Mitchell A. Kramer, Steven Kapustin, Philadelphia, Pa. for plaintiffs.

Randall B. Robinson, Texaco, Inc., White Plains, N. Y., Duane, Morris & Heckscher, Jane D. Elliott, Philadelphia, Pa., Kay, Scholer, Fierman, Hays & Handler, Ira S. Sacks, New York City, for defendant.

MEMORANDUM

CAHN, District Judge.

On the eighth day of trial in this labyrinthine antitrust case I directed a verdict in favor of the defendant. (N.T. 1860). The directed verdict did not dispose of all of the issues in the case, however, and the parties agreed to resolve one of these issues amicably and to submit the others to this court for a decision based on their written briefs.[1] (N.T. 1889–91). Now that I have received those briefs and had an opportunity to carefully review

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[1] The issue which the parties have agreed to resolve amicably involves a contract claim by plaintiff Sweeney against Texaco. The issues which remain for the court's decision are Texaco's counterclaims against Sweeney and the plaintiffs' claims for injunctive relief. I will decide Texaco's counterclaims in Part VIII of this opinion, but plaintiffs' claims for injunctive relief will be the subject of a separate opinion.

the record, I will explain why I decided to grant the defendant's motion for a directed verdict. I will also rule on one of the two issues which remain in this case. Before undertaking that task, however, I wish to set forth the facts and procedural history of this litigation.[2]

I. *FACTS*

The plaintiff, Edward J. Sweeney & Sons, Inc. (Sweeney), is a wholesaler and distributor of Texaco gasoline in the Eastern Pennsylvania and Southern New Jersey markets.[3] In addition to its wholesale business Sweeney owns several retail gasoline stations.[4] The defendant, Texaco, Inc. (Texaco), is a refiner of gasoline and other petroleum products. Sweeney has been in the wholesale gasoline business since 1944.[5] (N.T. 90). After several years as a consignee and wholesaler for other companies it first became a Texaco wholesaler and distributor in 1958 (N.T. 90–94). It has remained a Texaco wholesaler and distributor up to the present time. (N.T. 94). In 1963 Sweeney and Texaco entered into a distributor agreement which ultimately led to this litigation. (1963 Distribution Agreement; Plaintiffs' Exhibit 4; N.T. 100).

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[2] Due to the procedural posture of the case, this account of the facts will reflect only those which are uncontroverted. Inferences will be drawn in favor of the plaintiff. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978). *See Patzig v. O'Neil*, 577 F.2d 841 (3d Cir. 1978).

[3] Plaintiffs Mission Gas Oil Co., Inc., and Petroleum Products Co., are distributors who bought gasoline from Sweeney. (Plaintiffs' complaint ¶ 9 & 10). Their claims derive from Sweeney's and were not the subject of evidence introduced at trial. (*See* note 15, *infra*). Since the issues now before the court involve Texaco's liability to Sweeney for the actions it took toward Sweeney, this opinion will refer to Sweeney as the plaintiff.

[4] Sweeney owns these stations through its subsidiaries. (N.T. 14; Defendant's Exhibit 196).

[5] Sweeney began as a partnership which later became a corporation. Since the change in form is not relevant to this litigation, both the partnership and the corporation will be referred to as "Sweeney". (*See* N.T. 100).

Prior to 1965 Sweeney marketed gasoline through full-service gasoline stations. (N.T. 102). These stations provided services such as greasing, lubrication, and tuneups in addition to the selling of gasoline. (N.T. 101). Sometime in 1965 or 1966 Sweeney's stations began to sell gasoline at a discount. (N.T. 102). Although other discount gasoline stations sold only unbranded gasoline, the Sweeney stations sold Texaco branded gasoline at a price of between one and three cents per gallon less than the price of other branded gasoline sold in the area.[6]. (N.T. 132, 145, 156–163). After the adoption of the discount concept, Sweeney's gallonage increased steadily until in 1968 it won a wholesaler's gasoline sales contest for having shown the highest gallonage increase of all the Texaco distributors in the area. (Plaintiffs' Exhibit 6).

As Mr. Richard V. Sweeney, president of the plaintiff corporation testified, the Sweeney stations were able to offer a discount primarily because of two factors:

> (1) they ceased to offer any services other than the sale of gasoline and related products, becoming "gas & go" operations (N.T. 15, 102), and
>
> (2) they had lower freight costs than their competitors due to their proximity to the Texaco terminal (N.T. 179).

It is the second factor that forms the basis of the claims made in this case.

When Texaco sells gasoline to its distributors it charges a price which includes the cost of delivering the product to the distributor's bulk plant—a delivered price. (*See, e.g.* Plaintiffs' Exhibit 4). (N.T. 1251–56). However, if the distributor picks up the gasoline himself and thereby saves Texaco the cost of delivery, Texaco gives him a discount or hauling allowance. Although there are several methods by which Texaco could compute the amount of the hauling allowance (N.T. 34–37,

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[6] Unbranded gasoline or stations are those that are not identified with a major oil company. (N.T. 93-94, 123).

1251–56), in its dealings with Sweeney Texaco based the hauling allowance on the lowest common carrier rate applicable between a designated Texaco distribution point and the Sweeney bulk plant. (*See, e.g.*, Plaintiffs' Exhibit 5).[7] Since Sweeney had and continues to have its bulk plant in Pottstown, Pennsylvania, under this arrangement it could receive an allowance for the cost of hauling the product from the Texaco distribution point to Pottstown. (N.T. 109). From 1961 until 1970, the distribution point which Texaco designated as Sweeney's pick up point was the Texaco bulk plant in Westville, New Jersey. (N.T. 172). Sweeney thus received a hauling allowance on the lowest common carrier rate applicable between Westville and Pottstown. (N.T. 174).

Between 1965 and 1970 Sweeney acquired numerous retail gasoline stations within approximately twenty miles of Texaco's Westville, New Jersey, terminal. (N.T. 120–46, 177). Although most of these stations had been selling unbranded gasoline at a discount, upon acquisition by the Sweeney interests these stations became branded Texaco stations. (N.T. 120–46).[8] Unlike other branded stations, however, the Sweeney stations sold branded gasoline at a discount; they generally tried to price their product above unbranded but below branded gasoline. (N.T. 128–133). It was the hauling allowance that subsidized this practice. (N.T. 118).

Due to the proximity between these newly acquired Sweeney stations and Texaco's Westville bulk plant, Sweeney could pick up the product in Westville and transport it a short distance to its New Jersey and Philadelphia area stations. (N.T. 176–7). Sweeney did not transport all of the product it picked up at Westville to its bulk plant in Pottstown. This practice enabled Sweeney to receive an allowance for hauling product from

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[7] This exhibit was introduced but not admitted into evidence at the trial.

[8] Only one of the stations acquired by Sweeney during this period was a branded station (N.T. 144); the station in Essington, Pennsylvania, had been a Gulf station. (*Id.*).

Westville to Pottstown (roughly fifty miles), when in reality it was hauling product from Westville to points ten to twenty miles away.[9] (N.T. 177–179). (*See* Defendant's Exhibit 1). Receipt of this allowance permitted Sweeney to cut its costs and sell gasoline at a discount. (*Id.* 178–9). In effect the hauling allowance underwrote the discount.

After adopting the concept of selling branded gasoline at a discount through "gas & go" stations Sweeney prospered. Its prosperity did not augur well with its competitor Texaco retailers, however, and some of these retailers complained to Texaco that Sweeney's discount pricing was hurting them (N.T. 418). Sweeney contends that Texaco conspired with these retailers to raise the cost of Texaco gasoline to Sweeney and thus force Sweeney to raise its prices. It cites the actions of Texaco in 1970 and 1971 as evidence of this alleged conspiracy.

In the winter of 1970, Texaco personnel informed Sweeney that Texaco wished to change the Sweeney pick up point from Westville, New Jersey, to Macungie, Pennsylvania, where Texaco had a pipeline terminal. (N.T. 197). Macungie, Pennsylvania, is much closer to Pottstown (approximately twenty miles) than Westville, New Jersey (approximately fifty miles), and this change would have had the effect of reducing Sweeney's hauling allowance by about fifty percent (N.T. 180). (*See* Defendant's Exhibit 1). Given the importance of the hauling allowance to Sweeney's competitive position, Sweeney strenuously objected to this change. (N.T. 180).[10] Texaco then notified Sweeney that it

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[9] Sweeney did have some stations in the Pottstown area, and it therefore hauled some of the product to Pottstown. (N.T. 107, 117, 177). However, it is the existence of the stations close to Westville and Sweeney's practice of direct delivery that is material to this case.

[10] In 1967 Texaco had decided that it would be economically advantageous for it to have Sweeney pick up its product at the Texaco terminal in Macungie, Pennsylvania, rather than at the Westville terminal and it proposed this change to Sweeney. (*See* Plaintiffs' Exhibit 39; Defendant's Exhibit 439; N.T. 1287-1298, 1365-1375). Sweeney objected to such change, and it was not put into effect. (N.T. 181-184). The incident is mentioned here only for the sake of completeness; whatever favorable inferences Texaco would have a jury draw from it are rejected in light of the procedural posture of the case.

was exercising its right to cancel the 1963 distributor agreement.[11] (N.T. 180–81; Plaintiffs' Exhibit 8). As a result of negotiations between Texaco and Sweeney, however, Texaco agreed to continue to give Sweeney the Westville to Pottstown hauling allowance for an additional ninety days. (N.T. 187–188; Plaintiffs' Exhibit 10). This was designed to allow Sweeney to either adjust its operation to the new pick up point or seek an alternative source of supply.

Notwithstanding its efforts to that end Sweeney was unable to secure another supplier. (N.T. 188–190; Plaintiffs' Exhibits 19a–19u). In March of 1971, after further negotiations the parties arrived at a compromise: Sweeney would receive the Macungie to Pottstown hauling allowance effective June 1, 1971, but it would be permitted to pick up product at either the Westville or Macungie terminals. (March 1 letter agreement; Plaintiffs' Exhibit 10). This enabled Sweeney to continue to supply its southern New Jersey stations from the Westville terminal and mitigated the effect of the change in the hauling allowance.[12]

In December of 1971, however, Texaco notified Sweeney that effective February 29, 1972, it would terminate both the 1963 distributor agreement and the March 1 letter agreement. (N.T. 193–194; Plaintiffs' Exhibit 16). Although Sweeney again tried to obtain an alternate source of supply, it was again unsuccessful. (N.T. 197–199). After various negotiations, during which Sweeney threatened to seek injunctive relief, Texaco agreed to continue supplying Sweeney until such a time as it gave Sweeney ten days notice of its intention to discontinue its

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[11] This agreement contained a clause which allowed either party to cancel it by serving written notice of their intention sixty days prior to its anniversary date (*See* Plaintiffs' Exhibit 4).

[12] In return for this arrangement Sweeney signed a document which Texaco characterizes as a covenant not to sue. (Defendant's Exhibit 3). This court has already ruled that the document does not constitute a covenant not to sue. (N.T. 1888). (*See* N.T. 542-545).

supply. (Defendant's Exhibit 68A).[13] Sweeney does not contest the fact that Texaco never gave it such notice; indeed, Texaco has continued to supply Sweeney up to and including the present time.[14]

II. *ALLEGATIONS*

In 1974, wary of the tolling of the statute of limitations, Sweeney brought the instant suit. Sweeney alleged that the 1970 change in Sweeney's hauling allowance resulted from a conspiracy between Texaco and other Texaco retailers. According to Sweeney the object of this alleged conspiracy was to fix the resale price of Texaco gasoline. (N.T. 1802). Furthermore, Sweeney alleged that the 1971 termination of its distributor agreement also resulted from a price fixing conspiracy. According to Sweeney these alleged conspiracies are violative of § 1 of the Sherman Act, 15 U.S.C. § 1, and entitle it to treble damages as well as injunctive relief.[15]

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[13] In return for Texaco's promise to continue supplying Sweeney, Sweeney allegedly agreed not to sue Texaco. (*See* Defendant's Exhibit 68A). Unlike the written agreement which followed the March 1 letter agreement, (*see* note 12 and accompanying text, *supra*), the agreement referred to here was not reduced to writing. This court has already ruled that whatever agreement Texaco reached with Sweeney on that issue does not constitute a covenant not to sue. (N.T. 1888).

[14] Whether Texaco's failure to terminate this agreement resulted from the advent of federal regulation, as Sweeney alleges (N.T. 21) or from some other motive is irrelevant to this case, which involves alleged conspiracies in 1970 and 1971. However, for purposes of this motion we will assume that, as Sweeney contends, Texaco would have ceased to supply Sweeney sometime after 1972 if federal regulations adopted after 1972 had not prevented it.

[15] On June 1, 1979, this court granted the defendant's motion for partial summary judgment as to the claims of plaintiffs Mission Gas Oil Co. and Petroleum Co. for damages. The plaintiffs through their attorneys have represented to the court that denial of their claims for injunctive relief under §§ 1 and 2 of the Sherman Act follows from the grant of the defendant's motion for a directed verdict on plaintiff Sweeney's claims for damages under those sections. The court will dispose of all of the plaintiffs' claims for injunctive relief in a subsequent memorandum and order, however.

[1] In addition Sweeney claimed that Texaco's actions in 1970 and 1971 constituted an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and entitle it to treble damages as well as injunctive relief.[16] Sweeney also charged that imposition of the Pottstown to Macungie hauling allowance made it the victim of price discrimination in violation of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). For this alleged violation Sweeney also sought damages and injunctive relief.[17] Other claims made by Sweeney were either resolved by agreement of counsel[18] or withdrawn.[19]

Texaco responded to these allegations by asserting that it had changed Sweeney's hauling allowance only because it was economically advantageous for it to do so and that it had terminated Sweeney because of Sweeney's breaches of the hauling agreement and distributor contract, complaints received from customers about the condition of Sweeney's stations, and, most importantly, the sale by Sweeney of non-Texaco gasoline and diesel fuel from Texaco pumps as well as its use of Texaco marked trucks to deliver non-Texaco gasoline. Texaco thus brought several counterclaims against Sweeney for Sweeney's

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[16] See note 15 *supra* for the status of plaintiffs' claims for injunctive relief.

[17] Plaintiffs have taken the position that the grant of the defendant's motion for a directed verdict on plantiff Sweeney's claims for damages under the Robinson-Patman Act does not dictate the outcome of their claims for injunctive relief. They have submitted briefs on this issue, which this court will decide by subsequent memorandum and order.

[18] Sweeney's claim for damages for Texaco's alleged breach of the hauling agreement was resolved with Texaco's agreement to pay Sweeney whatever they determined the applicable ICC common carrier rate to be. (N.T. 1781-83, 1860). The court will therefore dismiss this claim pursuant to Local Rule of Civil Procedure 23(b). However, the court will deny Texaco's request for reimbursement of expenses occasioned by any changes in plaintiffs' theory of damages. (N.T. 1783). This is a complicated case and I think it only fair that each side bear the burden of that complexity.

[19] The plaintiff withdrew his claims under § 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). (N.T. 1781).

alleged trademark infringement and breach of contract.[20] Although Texaco acknowledged that it had received complaints from other Texaco retailers about the competitive effect of Sweeney's discount pricing, Texaco vehemently denied that it had taken any action as a result of those complaints.

Thus, in response to Sweeney's § 1 claim Texaco argued that unilateral action did not violate § 1 of the Sherman Act and that mere complaints could not establish the existence of a conspiracy. In response to Sweeney's § 2 claim Texaco asserted that Texaco did not and indeed could not have attempted to monopolize the market of Texaco gasoline because Texaco gasoline did not represent a separate market. In response to Sweeney's Robinson-Patman § 2(a) claim Texaco argued that the change in Sweeney's hauling allowance did not violate that section because the hauling allowance is a functional discount which is not part of the price for purposes of the Robinson-Patman Act and that, in any event this court lacked jurisdiction to decide the claim due to the absence of sales made in interstate commerce. Texaco also argued that Sweeney had failed to prove that it sustained the kind of economic damage required for recovery under § 2(a) of the Robinson-Patman Act and could therefore recover nothing.

III. *PROCEDURAL HISTORY*

After nearly five years of pretrial proceedings marked by discovery disputes the case was called for trial in March of 1979. However Sweeney, who had not filed its first set of interrogatories until January 31, 1979, argued that it could not proceed to trial at that time. The court agreed to give Sweeney further time to prepare the case but admonished that given the age of the case, it would not grant further continuances. On June 5, 1979, the case finally went to trial. Since Sweeney still claimed that it needed additional time to prepare certain aspects of the case, the court agreed to tailor the trial schedule to Sweeney's

[20] The court has not yet decided these claims, which the parties submitted for decision to this court following the grant of the defendant's motion for a directed verdict. The merits of these claims are discussed in Part VIII of this opinion.

needs. (N.T. 80). Based on its previous experience with this case the court was, however, unwilling to grant another continuance.

Throughout the trial the court allowed Sweeney to continue to conduct discovery. (N.T. 59–60, 339, 346). Indeed, on the first day of trial the court permitted a change in Sweeney's damage theory despite Texaco's claims that it would be prejudiced and put to considerable expense by such a belated alteration.[21] (N.T. 63–81, 332–47). I permitted this because, as I remarked from the bench, I did not want to see Sweeney's case "harmed through some inadvertent oversight." (N.T. 73). I am certain that no such harm has occurred. Sweeney presented all of the admissible evidence which it deemed necessary and cannot, five years after bringing the case, be heard to complain about inadequate preparation time.

On Monday, June 11, 1979, the fourth day of trial, Texaco gave this court a copy of its motion for a directed verdict. On the next day, when Sweeney was close to the conclusion of its case in chief, the parties discussed how the court should proceed. (N.T. 1236–1240). To accommodate the interests of judicial economy and fairness to the litigants, I decided to defer further consideration of the arguments raised by Texaco's motion until the following Monday.[22] Thus, after Sweeney rested, Texaco began to present its case.[23] By Monday, the date set for argu-

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[21] Sweeney wanted to change its damage theory from the difference between the Westville to Pottstown hauling allowance and the Macungie to Pottstown hauling allowance to the difference between the hauling allowance which Texaco gave Sweeney and that which Texaco gave Sweeney's competitors. (N.T. 62, 332-340). Although the court allowed Sweeney to do this, Sweeney seems to have relied on his original damage theory nonetheless. *See* notes 60, 66 *infra*.

[22] Since the court planned to be in recess Thursday and Friday, Sweeney would have ample opportunity to prepare a reply.

[23] This procedure is authorized by Fed.R.Civ.P. 50(a) which provides that,

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made.

ment on its directed verdict motion, Texaco had rested and Sweeney had concluded its case in rebuttal. This procedure, agreed to by the parties, gave Sweeney ample time to reply to Texaco's motion and efficiently utilized the jury's time by keeping the case fresh in their minds and leaving it ready for their decision in the event that Texaco's motion for a directed verdict should be denied.[24]

On Monday, June 18, 1979, the eighth day of trial, I granted Texaco's motion for a directed verdict. In Part IV of this memorandum I will set forth the standards applicable to such a motion. In Parts V through VIII I will discuss the issues raised by the motion and explain the reasons for my decision. In Part VIII I will discuss and decide the issues raised by Texaco's counterclaims for trademark infringement and breach of the distributor agreement.

IV. *STANDARDS APPLICABLE TO A MOTION FOR A DIRECTED VERDICT*

[2, 3] Rule 50(a) of the Federal Rules of Civil Procedure allows a party to move for a directed verdict "at the close of the evidence offered by an opponent . . . ." To decide such a motion the trial judge must analyze all the evidence presented by the party opposing the motion, reviewing that evidence in the light most favorable to that party and making all inferences in his favor. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 25 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978); *Fireman's Fund Insurance Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d

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[24] Although the court once suggested the possibility of bifurcating the case, (N.T. 80) this suggestion was never adopted. Indeed, before the court heard oral argument on Texaco's motion, the parties had submitted points for charge and the court had circulated proposed jury interrogatories among counsel. If the court had denied Texaco's motion for a directed verdict it would have conducted a charge conference and proceeded to charge the jury as soon as practicable thereafter.

Cir. 1976), *cert. denied,* 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977); *Denneny v. Siegel,* 407 F.2d 433, 439 (3d Cir. 1969); *Dovberg v. Dow Chemical Co.,* 353 F.2d 963, 968 (3d Cir. 1965), *cert. denied,* 384 U.S. 907, 86 S.Ct. 1344, 16 L.Ed.2d 360 (1966). The trial judge cannot pass on either the weight or the credibility of the evidence, *Brady v. Southern R. Co.,* 320 U.S. 476, 479–80, 64 S.Ct. 232, 88 L.Ed. 239 (1943), *Burchill v. Kearney-National Corp., Inc.,* 468 F.2d 384 (3d Cir. 1972), 5A Moore's Federal Practice, ¶ 50.02[1] at 50–25, since it must leave to the jury the task of "evaluat[ing] contradictory evidence and draw[ing] inferences therefrom." *Fireman's Fund Ins. Co. v. Videfreeze Corp.,* 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied,* 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977) (citations omitted). The trial judge, however, retains power to decide whether the evidence, so reviewed, would support a jury verdict in favor of the party opposing the motion. That party must have introduced more than a scintilla of evidence from which the jury could find in his favor; *Fireman's Fund Ins. Co. v. Videfreeze Corp.,* 540 F.2d 1171, at 1179 n. 6; *Denneny v. Siegel,* 407 F.2d 433 (3d Cir. 1969); 5A Moore's Federal Practice, ¶ 50.02[1] at 50–31 n. 22; he must have introduced sufficient evidence to support a jury verdict in his favor. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 529 F.2d at 25; *Hourston v. Harvlan, Inc.,* 457 F.2d 1105, 1108 (3d Cir. 1972). If a reasonable jury could not find that the party opposing the motion for a directed verdict had proved his case by a preponderance of the evidence the trial judge must direct a verdict against him.

[4] Sweeney has failed to introduce even a scintilla of evidence in support of its claim. It follows that it has also failed to introduce sufficient evidence to support a jury verdict in its favor. I reached this conclusion after careful review of the evidence and with full awareness of the difficulties inherent in proving an antitrust conspiracy. *See Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Like other courts, however, I recognized that "if an antitrust plaintiff, as well as any other plaintiff, does not present

enough evidence within his case-in-chief to support a reasonable finding in his favor, a district court has a duty to direct a verdict in favor of the opposing party." *Chisholm Bros. Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1139–40 (9th Cir.), *cert. denied*, 419 U.S 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974).[25] I will not shirk that duty.

V. *SWEENEY'S DAMAGE CLAIMS UNDER § 1 OF THE SHERMAN ACT*

[5] Section 1 of the Sherman Act proscribes "[e]very contract, combination, . . or conspiracy, in restraint of trade . ." 15 U.S.C. § 1. To establish a defendant's liability under this section a plaintiff must therefore prove that the defendant entered into a contract, combination, or conspiracy and that said conspiracy constituted a restraint of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The issue in this case is whether Sweeney has introduced enough evidence to allow the jury to conclude that Texaco conspired to

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[25] Texaco has taken the position that *Chisholm* requires Sweeney to introduce direct evidence of a conspiracy to survive a motion for a directed verdict. I disagree. *Chisholm* establishes the quantum of evidence which the plaintiff must introduce; it does not restrict the quality of that evidence. A contrary reading would make it practically impossible for plaintiffs to prevail in cases like this and would ignore the concerns expressed by the Supreme Court in *Poller*. Indeed, in *Westinghouse Electric v. CX Processing Labs, Inc.*, 523 F.2d 668 (9th Cir. 1975), the same court that decided *Chisholm* noted that the party opposing the motion for a directed verdict "was entitled to benefit from all reasonable inferences to be drawn from its evidence." 523 F.2d at 673. If the court had required that the plaintiff present direct evidence of the existence of a conspiracy it would not have said anything about the need for drawing inferences. In any event, whatever the validity of Texaco's contention in the Ninth Circuit, the law in this circuit is to the contrary. In *Venzie Corp. v. United States Mineral Prod. Co., Inc.*, 521 F.2d 1309 (3d Cir. 1975), the court stated unequivocally that the plaintiffs "could rely on the inference of the existence of an agreement from circumstantial evidence." 521 F.2d at 1312.

fix the retail price of Texaco gasoline.[26] On June 8, 1979, I ruled that Sweeney had failed to meet this burden.

[6] Sweeney alleged that Texaco violated § 1 of the Sherman Act by conspiring to change Sweeney's hauling allowance in 1970. Sweeney introduced two items of evidence in support of its § 1 claim. First, it showed that some Texaco retailers had complained to Texaco that Sweeney's policy of discount pricing was hurting their sales. Second, Sweeney produced one James P. Rodden, a former Texaco employee now working for a Sweeney-related enterprise, who testified he thought that Texaco had terminated Sweeney because of Sweeney's pricing policy. This evidence cannot, as a matter of law, support a jury finding of a contract, combination, or conspiracy between Texaco and other Texaco retailers either in 1970 or 1971.

Prior to the oral argument on Texaco's motion for a directed verdict Sweeney had not specified the nature of this conspiracy or the identity of the putative co-conspirators. Even at oral argument the court was unable to obtain this information. (*Compare* N.T. 1802–08 with N.T. 1811–17). Before granting Texaco's motion I evaluated whether the evidence would support a finding of either a horizontal or vertical price fixing combination or conspiracy in either 1970 or 1971. I will follow that analysis here.

A. 1970 COMBINATION OR CONSPIRACY—CHANGE IN SWEENEY'S HAULING ALLOWANCE.

1. HORIZONTAL PRICE FIXING AGREEMENT.

[7, 8] To find that Sweeney had introduced sufficient evidence to allow the jury to conclude that Texaco had conspired with other Texaco retailers to fix the retail price of Texaco gasoline I would have to find that competitors' complaints, without

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[26] There is no question that such a conspiracy, if established, would constitute an unreasonable restraint of trade. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

more, permit an inference of concerted action.[27] Like numerous courts before me, I hold that evidence of competitors' complaints standing alone cannot support a finding of liability under § 1 of the Sherman Act. *Westinghouse Electric Corp. v. CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963); *Carr Electronics Corp. v. Sony Corp. of America,* 472 F.Supp. 9 (N.D.Cal.1979); *Carbon Steel Products Corp. v. Alan Wood Steel Co.,* 289 F.Supp. 584 (S.D.N.Y.1968).

In *Carr Electronics Corp. v. Sony Corp. of America,* 472 F.Supp. 9 (N.D.Cal.1979), the court faced this precise issue. Carr, a dealer of Sony products, claimed that Sony had terminated its dealership because Carr had adopted a discount pricing policy as a result of which Carr's competitors had "complained forcefully to Sony that they were unhappy with the fact that several low-overhead dealers were underselling them." 472 F.Supp. at 10 (footnote omitted). Carr thus brought an action against Sony alleging that Sony had conspired to fix the retail price of television sets and thus violated § 1 of the Sherman Act. Faced with Sony's motion for summary judgment, Carr argued

> [T]hat the court must, as a matter of law, permit the inference that the complaints of the dealers, followed by Sony's termination of Carr, constitutes an illegal combination in violation of the antitrust laws.

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[27] Such a combination, if shown, would effect a horizontal restraint. As the court of appeals explained in *Cernuto, Inc. v. United Cabinet Corp.,* 595 F.2d 164 (3d Cir. 1979),

> [I]f the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level. . . .

595 F.2d at 168.

Id. 472 F.Supp. at 12. The court rejected that argument.

Like Sweeney, Carr relied on *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963). Like the *Carr* court, I find that the facts of *Girardi* were "much more extreme than those of the instant case," 472 F.Supp. at 13, and that Sweeney's reliance on *Girardi* is unwarranted.

The plaintiff in *Girardi* was a discount dealer of the defendant's products who had argued that its termination by the defendant had come as a result of complaints by the plaintiff's competitors. Unlike the plaintiffs in both *Carr* and the instant case, however, the plaintiff in *Girardi* had shown that one of the defendant's salesmen had actually threatened him with termination if he did not cease discount pricing. 352 F.2d at 198. There is simply no such evidence in this case. Indeed, Sweeney's president testified that Texaco never interfered with the way in which Sweeney arrived at the price at which it sold gasoline (N.T. 382),[28] and that Texaco had never threatened to take any action in response to Sweeney's marketing practices (N.T. 379).[29]

Moreover, the internal memoranda of the defendant in *Girardi* showed that management was concerned about exercising control over the dealer's marketing practices and actively sought ways of exercising that control. Again, there is simply no such evidence in this case. Although Texaco's management was

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[28] By Texaco's counsel to Mr. Sweeney:

Q Now, my tenth and last question to you, Mr. Sweeney, is has Texaco ever interfered in the method or manner by which E. J. Sweeney and Sons Incorporated arrived at the price at which your company sold gasoline to any of your customers?

A No.

(N.T. 382).

[29] By Texaco's counsel to Mr. Sweeney:

Q Question Number 7, did Texaco ever take any action or threaten to withhold any action or refrain from performing certain acts should you market gasoline in a way that you felt was desirable, and which for one reason or another Texaco felt was undesirable?

A No.

(N.T. 379).

aware of the complaints, there is no evidence to show that it took any action in response to them. There is, however, an abundance of evidence that Texaco had other, legitimate reasons for changing Sweeney's hauling allowance and terminating its distributor agreement.[30] Thus, a marketing study conducted by Texaco had demonstrated that it would be more economical for Texaco to have Sweeney pick up at Macungie instead of at Westville. (Plaintiffs' Exhibits 35, 39; Defendant's Exhibit 438-439; N.T. 1287–1298, 1365–1378). Furthermore, Texaco had received numerous complaints from customers regarding the condition of Sweeney owned stations and had misgivings over Sweeney's credit card practices. (N.T. 1304–1322). Most importantly, Texaco was concerned about Sweeney's undisputed practice of commingling Texaco gasoline with gasoline purchased from other refiners, selling non-Texaco diesel fuel from Texaco pumps and using Texaco branded trucks to deliver non-Texaco gasoline.[31] (N.T. 1313; Plaintiffs' Exhibit 18; Defendant's Exhibits, 55, 64, 66, 435A–K). Significantly, the defendant in *Girardi* could point to no other justification for its actions, and indeed was so bold as to terminate the plaintiff's dealership in two areas where he engaged in discounting but not in a third where he did not engage in discounting. There is no similar evidence in this case, therefore like the *Carr* court, I have concluded that

> [I]t was on a much more forceful record that the *Girardi* court held that the jury should be permitted to infer a combination in violation of section 1 of the Sherman Act. The mere fact that dealers complained does not require sending the case to the jury, despite the appeal of some of the *Girardi* court's language.

472 F.Supp. at 13.

Even the facts of *Carr* itself are stronger than the facts of this case. In *Carr,* there was evidence, albeit of doubtful admis-

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[30] This evidence cannot and does not serve as the basis for my decision. I am noting it only to show the contrast between the strength of the facts in *Girardi* and the weakness of the facts in the case at bar.

[31] These actions are the subject of Texaco's counterclaim against Sweeney, which will be discussed in Part VIII hereof.

sibility, that one of the defendant's salesmen had told the plaintiff that other retailers were complaining and that the defendant "intended to take some action." *Id.* at 13 n. 5. Sweeney never even attempted to introduce any evidence that Texaco either responded to the complaints or told Sweeney that it would take any action in response thereto. My decision in this case thus follows *a fortiori* from the court's decision in *Carr.*

Other courts agree. In *Carbon Steel Products Corp. v. Alan Wood Steel Co.*, 289 F.Supp. 584 (S.D.N.Y. 1968), the plaintiff, a wholesaler of steel products, alleged that the defendant manufacturer had conspired with other wholesalers in violation of § 1 of the Sherman Act. The plaintiff sought to survive the defendant's motion for summary judgment by arguing that evidence of complaints to the defendant manufacturer by plaintiff's competitors would permit an inference of conspiracy. The court rejected this argument and held that,

> A combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of Wood's customers complained of Carbon Steel's practices, since it was the normal working of the marketplace for them to have done so. Cf. *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963).

289 F.Supp. at 588.

Sweeney has shown even less evidence of a conspiracy than the plaintiff in *Carbon Steel.* In that case the plaintiff had submitted copies of memoranda drafted by the defendant's district sales manager to the attention of a marketing vice president and a general manager; after explaining the substance of the complaints received from plaintiff's competitors, these memoranda "urged that all business relations with Carbon Steel be severed." 289 F.Supp. at 587. The court nevertheless granted the defendant's motion for summary judgment on the ground that the plaintiff had failed to demonstrate the existence of a combination. A similar conclusion follows in this case. Sweeney has not even introduced evidence of internal memoranda and in light of the *Carbon Steel* holding Sweeney can hardly maintain that

mere discussion of the complaints by Texaco management suffices to show the existence of a combination or conspiracy.

Carbon Steel illustrates the difference between the type of internal communications which permit the inference of a combination and those which do not. In the former situation the communications show that the manufacturer knew of the complaints and planned specific actions in response thereto *(Girardi)*. In the latter situation the communications show only that the manufacturer knew of the complaints *(Carbon Steel, Carr)*. The courts agree that where the communications show only the manufacturer's knowledge they cannot serve as the basis for an inference of a combination *(Carbon Steel, Carr)*, whereas if the communications show knowledge plus an intent to act on the complaints, they can *(Girardi)*.

[9] This conclusion has its genesis in sound policy considerations, as the *Carbon Steel* court noted. It would be inequitable to hold that the mere receipt of a complaint creates an inference of a combination between the recipient and the complainant.[32] The recipient cannot help receiving the complaint and it would be unfair, without additional evidence of the existence of a conspiracy, to hold him liable for something over which he has no control. It is only if he acts upon the complaints, thereby becoming more than a passive recipient, that he turns into a coconspirator and violates the antitrust laws. As the court of appeals has noted, "[t]he substantial law of trade conspiracies requires some consciousness of commitment to a common scheme." *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963), *quoting United States v. Stan-*

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[32] It is irrelevant that the making of such a complaint could be construed as violative of § 1 of the Sherman Act. *See* note 27 *supra*. Even if that were so, to draw an inference of combination between the maker and the recipient of a complaint from the mere receipt of a complaint would be somewhat like holding that the subject of an attempted bride is guilty of bribery. The issue of the complainant's liability is not before me, however, and I express no view on its merits. Neither Sweeney nor the plaintiffs in *Carr* or *Carbon Steel* sought to hold their competitors liable for violations of § 1 of the Sherman Act.

dard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963). *See Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1078 (3d Cir. 1978). I can perceive no reason for departing from this rule.

Contrary to Sweeney's assertions, *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979), does not require a different result. In *Cernuto* the court of appeals decided that an agreement between a manufacturer and one of his customers to refuse to deal with another customer would constitute a *per se* violation of § 1 of the Sherman Act. The plaintiff in *Cernuto* was a discount seller of the defendant's products. The plaintiff alleged that the defendant, at the insistence of one of plaintiff's competitors, had refused to deal with the plaintiff. Since plaintiff could not prove that the defendant's conduct had any anti-competitive effect, he could recover only if the court held that the defendant's conduct constituted a *per se* violation of § 1. 595 F.2d at 165. For the sole purpose of deciding the propriety of the district court's grant of the defendant's motion for summary judgment the court of appeals assumed that the plaintiff could show that the manufacturer terminated him as a result of the complaints. *Id.* The court carefully pointed out that it had before it only the question of

> [W]hether the conduct at issue here—a manufacturer deliberately withdrawing its product from a distributor that resold it for a price less than its competitors *at the request* of a competitor—should be classified as a *per se* violation of the [Sherman] Act.

595 F.2d at 166 (emphasis added). It answered that question in the affirmative.

Cernuto does not govern this case, however. There is no question that if Sweeney had succeeded in proving the allegations in its complaint it would have made out a *per se* violation of the Sherman Act; that is all that *Cernuto* decided. The issue in this case—whether complaints permit the inference of a combination—was neither considered nor decided by the *Cernuto* court. Indeed the instant case presents the question that the trial judge in *Cernuto* will have to decide upon remand:

whether the plaintiff has introduced enough evidence of the allegations in his complaint to allow a jury to find in his favor. Thus, the court of appeal's decision in *Cernuto* does not foreclose a decision favorable to the defendant in this case.[33]

Aside from the evidence of complaints which other retailers made to Texaco, Sweeney introduced no evidence of a conspiracy between Texaco and its retailers or wholesalers. I have concluded that on the basis of such evidence no reasonable jury could find that Texaco engaged in a combination or conspiracy in restraint of trade by changing Sweeney's hauling allowance in 1970.

2. VERTICAL PRICE FIXING—RETAIL PRICE MAINTENANCE.

[10] Sweeney also argued that Texaco conspired with the complaining dealers to maintain the resale price of Texaco gasoline.[34] Alternatively, Sweeney argued that Texaco conspired with

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[33] Neither does the more recent decision in *Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979), filed subsequent to my ruling on Texaco's motion for a directed verdict in this case, command a different result. In *Mannington*, as in *Cernuto*, the antitrust claims were decided on a motion for summary judgment; therefore, as in *Cernuto*, the court in *Mannington* assumed the existence of an agreement between the plaintiff licensee and the defendant licensor to terminate competing licenses. At 1070. The court decided only whether that agreement violated the antitrust laws or whether the defendant's "status as a patent monopolist immunize[d] this otherwise actionable conduct from antitrust attack." At 1070. The court did not purport to decide the question at issue here.

Moreover, the *Mannington* court objected to the entry of summary judgment before the plaintiffs had a full opportunity to conduct discovery. In this case, however, Sweeney has had ample opportunity to conduct all the discovery it desired and has received numerous indulgences from the court to that end. *See* Part III, *supra*. It cannot claim that its lack of evidence results from an inadequate opportunity to conduct discovery.

[34] The term retail price maintenance will be used herein to refer to any attempt by Texaco to influence the retail price of its gasoline, even if such an attempt extends only to attempting to raise or lower the price without setting forth a specific figure.

Sweeney as of the time Sweeney agreed to the change in the hauling allowance. Sweeney cites *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), and *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), in support of these contentions. However, as the Court of Appeals for the Second Circuit noted in *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1978), to succeed in such a claim the plaintiff must prove that the manufacturer had a program of resale price maintenance, that it sought the aid of plaintiff's competitors in enforcing said program, and that its actions toward plaintiff were designed to secure compliance with the desired resale price. Sweeney has neither alleged nor proved any of these things.

[11] In *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), the Supreme Court made it clear that unilateral action by a manufacturer does not violate § 1 of the Sherman Act. This basic premise remains unchanged despite a series of Supreme Court decisions which defined and narrowed the limits of unilateral behavior. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024 (1944); *F.T.C. v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1922); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 41 S.Ct. 451, 65 L.Ed. 892 (1921); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920); *Areeda*, Antitrust Analysis, 559–560 (1974).

The defendant in *Colgate* was a manufacturer who had published lists of the prices at which its products should be sold and had announced that it would refuse to sell to any dealers who failed to charge those prices. The Court refused to find that such conduct violated § 1 of the Sherman Act and held that,

> In the absence of any purpose to create or maintain a monopoly, [which would bring the case under § 2, not § 1] the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to par-

> ties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

250 U.S. at 307, 39 S.Ct. at 468. The Court thus distinguished Colgate's practice from that which it had condemned in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), where "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." 250 U.S. at 307–08, 39 S.Ct. at 468.

[12, 13] Through a series of decisions culminating with *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), the Court blurred the seemingly clear line between conduct permitted (*Colgate*) and proscribed (*Dr. Miles*) by § 1 of the Sherman Act. The defendant in *Parke Davis* had announced that it would refuse to sell to wholesalers who sold to retailers who failed to charge the resale prices specified by Parke Davis. Parke Davis effectuated this policy by supplying wholesalers with the names of retailers who refused to charge the prices specified by Parke Davis; the wholesalers then had to either stop supplying the offending retailers or face the loss of supplies from Parke Davis. In holding that this scheme violated the Sherman Act the Court reasoned that by

> [T]hus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices . . . . Although Parke Davis' originally announced wholesalers' policy would not under Colgate have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the Wholesalers' Net Price Selling Schedule, that entire policy was tainted . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices. . . .

362 U.S. at 45–6, 80 S.Ct. at 512–513. The Court thus identified the factors which a plaintiff must establish before a jury can find liability for resale price maintenance under § 1 of the Sherman Act:

1. the announcement of a suggested retail price;

2. procurement of competitors' assistance in insuring compliance with that price.

Since Sweeney has not alleged that Texaco had any announced retail prices it has failed to fulfill the first requirement of *Parke Davis.*[35]

[14] Even if I found that announcement of suggested retail prices was not required for a finding of liability under *Parke Davis,* I would nevertheless have to hold that Sweeney has failed to show that Texaco entered into a combination, as defined by the *Parke Davis* court. Sweeney has not introduced any evidence from which a jury could reasonably infer that Texaco took "affirmative action" to ensure adherence to some particular resale price.[36] *Compare United States v. Parke, Davis & Co.,* 362 U.S. at 47, 80 S.Ct. 503 (1960) (Court held that when manu-

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[35] Sweeney has even failed to establish that Texaco had any policy whatsoever on the level of their retail prices. *See* note 34 *supra.*

[36] Courts have long distinguished between a manufacturer who takes affirmative action to ensure compliance with his pricing policies (unlawful) and a manufacturer who merely announces such a policy (lawful). In *Gray v. Shell Oil Co.,* 469 F.2d 742 (9th Cir. 1972), *cert denied,* 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973), the court instructed the jury that the key issue was

> [W]hether Shell dealers were free to make their own pricing decisions or whether Shell deprived its dealers of their free choice by use of affirmative conduct. . . .
>
> The distinction . . . between 'coercion' on the one hand and 'exposition, persuasion and argument' on the other, . . . is firmly imbedded in the decisional law on vertical price-fixing." 469 F.2d at 747-48 (citations and footnotes omitted).

facturer takes affirmative action to achieve uniform adherence to a particular price he engages in concerted action and violates § 1 of the Sherman Act). Sweeney has shown only that other retailers complained to Texaco. Like other courts, I find that such evidence does not permit an inference of concerted action. *Westinghouse Electric Corp. v. CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975); *Butera v. Sun Oil Co., Inc.,* 496 F.2d 434 (1st Cir. 1974); *Dart Drug Corp. v. Parke, Davis & Co.,* 120 U.S.App.D.C. 79, 344 F.2d 173 (1965); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963); *Carbon Steel Products Corp. v. Alan Wood Steel Co.,* 289 F.Supp. 584 (S.D.N.Y. 1968); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.,* 602 F.2d 1025 (2d Cir. 1979); *Carr Electronics Corp. v. Sony Corp. of America,* 472 F.Supp. 9 (N.D.Cal.1979).

In *Westinghouse Electric Corp. v. CX Processing Laboratories,* 523 F.2d 668 (9th Cir. 1975), a retailer sued a manufacturer when the manufacturer refused to fulfill the terms of a contract which gave the retailer a more favorable price than that available to the retailer's competitors. The retailer alleged that the maufacturer's conduct resulted from a combination or conspiracy to stabilize prices between the manufacturer and the retailer's competitors. As evidence of this combination the retailer showed that its competitors had called the manufacturer to request that the manufacturer give them the same price offered to the retailer pursuant to the terms of the contract.[37] The retailer also introduced the testimony of one of its principal owners who had said that *in his opinion* the conversations between the manufacturer and the other retailers had resulted in an agreement to fix prices. Faced with such meager evidence, which nevertheless exceeds that presented by Sweeney in this

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[37] The manufacturer had offered the plaintiff a very favorable contract as a means of inducing him to distribute its products rather than those of one of the manufacturer's competitors. The contract was designed to meet an offer by one of these competitors. 523 F.2d at 671.

case,[38] the district court directed a verdict in favor of the defendant. The Court of Appeals for the Ninth Circuit affirmed.

In reaching this conclusion the court of appeals examined the case law cited by the retailer, which includes that cited by Sweeney, but found all of those cases distinguishable because

> In each instance the guilty manufacturer established either an express resale price or a method to prevent resale to either certain customers or within certain territories. Generally, these policies were imposed upon wholesalers or retailers through a well-defined enforcement scheme.

523 F.2d at 674–75, and Westinghouse had established no such price or method. Like Westinghouse, Texaco did neither of these things.

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[38] Sweeney also introduced the opinion testimony of one James P. Rodden, a former Texaco employee who now works for a Sweeney-related entity. (N.T. 389-506). Rodden testified that "[t]o the best of my knowledge I *believe* [that Texaco changed Sweeney's hauling allowance] due to the fact of the retailers and the loss of volume that we encountered through that and their complaints to our management . . ." (N.T. 457) (emphasis added). However, Rodden's testimony related to 1973, three years after the alleged conspiracy took place. (N.T. 421-22). *See* note 45, *infra*. Whatever possible relevance that testimony may have had on the alleged 1970 and 1971 conspiracies is negated by the rest of his testimony, for Rodden also testified as follows:

By Texaco's counsel to Mr. Rodden:

Q Mr. Rodden, it is correct, isn't it, that you do not have any knowledge of any contract or understanding between Texaco and any person, partnership or corporation outside of Texaco, the purpose of which was to injure, harm or destroy Sweeney's business?

A. No.

Q And, isn't it also correct, Mr. Rodden, that you were not aware of any instance where Texaco took any action in its dealings with Sweeney as a result of a contract or understanding between Texaco and any other entity?

A Not that I know of, no.

Q And, Mr. Rodden, as far as you are aware, Texaco did not change or attempt to change Sweeney's point of supply as a result of anything said by any Texaco retailer, isn't that correct?

A That's, I gather that would be correct, yes.

Indeed, *Westinghouse* presented a more attractive case for denying the defendant's motion for a directed verdict than does this case because at least in *Westinghouse* the court could find that the manufacturer had "discouraged direct competition with one other distributor," 523 F.2d at 675, and the record in this case does not permit such a finding. (N.T. 379–82, 389–506). There is absolutely no evidence that Texaco announced a suggested retail price or price range for Texaco gasoline or that it solicited the aid of other retailers in policing its enforcement. (N.T. 461). Indeed, there is no evidence that Texaco tried to influence the retail price of Texaco gasoline in any manner whatsoever. (N.T. 379–382, 455–461). As the court noted in *Carbon Steel,* the retailers who complained were simply following rational market behavior, and their unsolicited activity cannot serve as the basis for finding §1 liability under even the most favorable reading of *Parke Davis.*

The court's decision in *Butera v. Sun Oil Co., Inc.,* 496 F.2d 434 (1st Cir. 1974), a case strikingly similar to this one, confirms the wisdom of this conclusion. The plaintiff in *Butera* was a retailer of defendant Sun Oil's products. He alleged that a

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Q That is correct?

A It's correct.

Q Mr. Rodden, are you aware of any instance where Texaco coerced Sweeney or any other Texaco distributor to refrain from dealing with Texaco service stations who engaged in vigorous price competition?

A No, I'm not aware.

Q Not aware of any such instance?

A No.

Q Are you aware of any instance where Texaco increased the price of gasoline to Sweeney or to any other distributor as a result of their contract or understanding with anyone outside Texaco?

A No.

(N.T. 455-461). This testimony makes Sweeney an even weaker case than *Westinghouse,* where there was no indication that the plaintiff's own witness ever made such categorically absolving statements. Indeed Mr. Sweeney, the president of the plaintiff in the instant case testified that Texaco had never interfered with the way Sweeney marketed gasoline or with the method which Sweeney used to arrive at the retail price of Texaco gasoline. (N.T. 379; 382). *See* notes 28-29, *supra.*

change in Sun Oil's method of computing certain allowances prevented him from taking advantage of fluctuations in the wholesale price of gasoline and thus reduced his profit. Although the plaintiff argued that Sun Oil's action constituted resale price maintenance in violation of § 1 of the Sherman Act, the district court granted Sun Oil's motion for summary judgment and the court of appeals affirmed.

As the court of appeals explained Sun Oil, like Texaco, had not suggested the resale price of the gasoline it supplied to the plaintiff. The court further reasoned that:

> [A] producer's tight control over its wholesale prices does not become resale price maintenance merely because retail outlets to which it sells, being highly competitive and selling at low margins, are sensitive to every change in wholesale prices.
>
> . . . . .
>
> The decision as to what margin to use and when to change it, and consequently what retail price to charge remains Butera's, and we agree that such economic impact as follows from Sun's tight control of its own wholesale pricing is not a Sherman Act violation.

496 F.2d at 437–38. Therefore the court held that the plaintiff had failed to show that by changing the method of computing the plaintiff's allowance Sun Oil violated § 1 of the Sherman Act.

The facts proven by the plaintiff in *Butera* closely parallel those proven by Sweeney. In both cases the plaintiffs adopted a method of operating which employed their supplier's special allowances to increase their profits. Sweeney used the hauling allowance as a subsidy by acquiring stations near Westville and Butera used the volume allowance as a bonus by speculating on the price of gasoline and filling his oversize tank when he thought that due to fluctuations in the price he would get a larger allowance. In both cases the cost of the product to the plaintiffs was increased when the defendant changed the method of calculating the allowance. If the injury to the plaintiff did not

suffice to establish a § 1 violation in *Butera* it cannot suffice here. *Butera* shows that *Colgate* survived *Parke Davis* and that when a manufacturer acts like Texaco, independently and for its own business purposes, it does not violate the Sherman Act. To hold otherwise would be to hold that Texaco had a duty to continue to give Sweeney a hauling allowance solely to provide Sweeney with an advantage over its competitors.[39] That I cannot do.

[15] Sweeney has also argued that in light of the Supreme Court's decision in *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), an agreement between Texaco and the complaining retailers can be established merely because the retailer's complaints helped Texaco effectuate its plan to force Sweeney to raise its prices. Prior to the oral argument on the defendant's motion for a directed verdict Sweeney cited *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 477 F.Supp. 867 (S.D.N.Y.1978), as the strongest authority for its position.[40] However, just before the oral argument counsel learned that the Court of Appeals for the Second Circuit had reversed the district court in *Fuchs*, 602 F.2d 1025 (2d Cir. 1979).

The plaintiffs in *Fuchs* were general sugar brokers who sometimes bought sugar from the defendant Amstar. In addition to general brokers, such as plaintiffs, who arranged for sales of

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[39] As the *Westinghouse* court noted such a procedure could have exposed Texaco to liability under the Robinson-Patman Act in a suit brought by Sweeney's competitors. 523 F.2d at 676. For a more detailed discussion of this argument see Part VII, *infra*.

[40] At the conclusion of the first day of trial the court asked counsel for the plaintiff, off the record, what the best authority for his position was. Counsel cited the district court's opinion in *Fuchs* as his best authority. (*See* N.T. 1853 for an on the record discussion of this conversation). The court then expressed its concern over differences in the facts of *Fuchs* and Sweeney which seemed to make *Fuchs* a much stronger case for denial of the defendant's motion for judgment notwithstanding the verdict than was Sweeney. (The standards for deciding motion for directed verdict and judgment notwithstanding the verdict are identical. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (3d Cir. 1970)).

sugar from Amstar as well as from Amstar's competitors, Amstar dealt with direct brokers who arranged only for sales of Amstar's products. It was undisputed that the operation of the general brokers reduced the price of Amstar's sugar and therefore lowered Amstar's profit margin. To increase its profit margin Amstar decided to change its system of distribution by ceasing to deal through general brokers. It then gave the general brokers the choice of becoming direct brokers or being terminated. Although some of the former general brokers agreed to become direct brokers the plaintiffs did not.

Relying, like Sweeney, on *Albrecht*, the plaintiffs in *Fuchs* alleged that Amstar's actions resulted from a combination violative of § 1 of the Sherman Act. The jury agreed and returned a verdict for the plaintiffs. Since the district court had refused to grant Amstar's motion for judgment n. o. v., Amstar appealed. The Court of Appeals for the Second Circuit held that the defendant's conduct did not violate § 1 of the Sherman Act and reversed the district court's denial of the defendant's motion for judgment n. o. v.

My decision in this case follows inexorably from *Fuchs*. The court of appeals reversed the district court in *Fuchs* even though the plaintiffs had argued that the "jury . . . could infer that Amstar's goal in terminating its general brokers was anti-competitive and that the conduct of its general and/or direct brokers materially aided and abetted its accomplishment," *Id.* 1031, and that Amstar therefore engaged in a combination or conspiracy. Sweeney could not even make such an argument in this case for Sweeney has not alleged, and indeed could not show, that the complaints of its competitors aided and abetted Texaco's allegedly anti-competitive scheme. In this case there is simply no one in the position of the brokers in *Fuchs* who, like the substitute distributor in *Albrecht*, reaped the benefit of the defendant's allegedly anti-competitive behavior. Both in *Fuchs* and in *Albrecht* third parties entered into agreements which resulted in their receipt of business which might otherwise have gone to the plaintiff. The change in Sweeney's hauling allowance had no such effect, for Sweeney's gallonage continued to in-

crease (Plaintiffs' Exhibit 109) and Sweeney's distributorship was never given to anyone else. If in *Fuchs*, where there was an agreement between the defendant and another entity which received business otherwise given to plaintiff the court did not find that the jury could infer a conspiracy in violation of the Sherman Act, I cannot so find in this case, which lacks even that agreement.[41] The court of appeals has been unwilling to expand "*Albrecht* beyond its narrow factual confines," *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1074 (3d Cir. 1978), and I believe that it would agree with the *Fuchs* court and refuse to expand *Albrecht* to cover the facts of this case.

[16] As the *Fuchs* court realized, the jury's ability to infer that the defendant had an anticompetitive purpose in taking the action in question is immaterial. As long as Texaco, like Amstar, acted without soliciting the aid of any other entity, as is undisputedly the case here,[42] its motives are irrelevant. As the Court of Appeals for the District of Columbia has held,

> To establish the illegality of [an] act under Section 1, it is not enough to prove that [the defendant's] motivation was that of punishment for discounting or anything else, however reprehensible.

Dart Drug Corp. v. Parke, Davis & Co., 120 U.S.App.D.C. 79, 92, 344 F.2d 173, 186 (1965) (footnote omitted). While such motivation may do violence to the policy behind the Sherman Act it does not without more constitute a violation of that act.

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[41] As in *Fuchs*, there is no evidence that any other entity knew that Texaco planned to change Sweeney's hauling allowance. Therefore, as in *Fuchs*, I cannot hold that the jury could infer that any other entity participated in that decision.

[42] Sweeney has never alleged that Texaco sought the aid of Sweeney's competitors to enforce its alleged desire to have Sweeney charge higher prices.

Id. at 92, 344 F.2d at 186 n. 6.[43] *House of Materials Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). *See Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1069 (3d Cir. 1979).

[17] Neither can I find that the hauling agreement, as revised in 1971 to provide for a hauling allowance equivalent to the Macungie to Pottstown rate (Plaintiffs' Exhibit 10), was itself an agreement in restraint of trade violative of § 1. Sweeney raised this theory for the first time in its response to Texaco's motion for a directed verdict. It urged that under the famous footnote 6 in *Parke Davis*, the jury could find that Sweeney and Texaco entered into an unlawful agreement when Sweeney reluctantly accepted the change in the hauling allowance.[44] In further support of this argument Sweeney cites the district court's opinion in *Fuchs*, which made passing reference to the possibility of establishing such a conspiracy. *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 447 F.Supp. 867, 875 (S.D.N.Y.1978), *rev'd* 602 F.2d 1025 (2d Cir. 1979). Notably, the court of appeals did not even discuss this theory.

Sweeney misapprehends the teachings of footnote 6 in *Parke Davis*. In *Perma Life Mufflers, Inc. v. International Parts*

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[43] *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972), does not mandate a contrary result. First, that case involved temporary price allowances, a subject which plaintiffs explicitly withdrew from consideration in this case. (N.T. 1840). Second, unlike Texaco, the defendant in that case had announced suggested retail prices and the court based its decision on that fact.

[44] In footnote 6, the Court stated that,

> Indeed, if [the large retailer's] resumed adherence to the Parke Davis price scale after the interview between its vice-president and Parke Davis' assistant branch manager, [p. 510] supra, shows that Parke Davis and [the retailer] entered into a price maintenance agreement, express, tacit or implied, such agreement violated the Sherman Act without regard to any wholesalers' participation.

362 U.S. at 45, 80 S.Ct. at 512 n. 6. It should be noted that these remarks represent only dicta, since *Parke Davis* was a case brought by the government. The large retailer to which the court referred was not seeking to establish Parke Davis's liability to it on the basis of that agreement.

Corp., 392 U.S. 134 (1968), the court expanded on the theory first alluded to in *Parke Davis*. The plaintiffs in *Perma Life*, franchisees of Midas muffler shops, had sued the franchisor for alleged violations of § 1 of the Sherman Act. The franchisees charged that certain tying clauses and other restrictive provisions in the franchise agreement constituted unlawful restraints of trade. The franchisor argued that the franchisees had been willing participants in the agreements and that their claims were barred by the doctrine of *in pari delicto*. The Court, relying on its prior decision in *Parke Davis*, rejected the defendant's argument and held it liable for violating § 1. Two points, though not articulated in the opinion, are crucial to understanding the court's decision.

First, the agreement between the dealer and the franchisor, in so far as it contained tying provisions, was unlawful on its face as a *per se* violation of § 1. *International Salt Co., Inc. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947). This made it like the agreement alluded to in footnote 6 of the *Parke Davis*, which in so far as it provided for adherence to predetermined resale prices, would have been unlawful on its face as a *per se* violation of § 1. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). *See United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Second, the Court decided only that the defense of *in pari delicto* would not apply in an antitrust case. It did not decide that an agreement would violate the Sherman Act merely because it was not as economically advantageous to one of the parties as he would wish.

[18] After understanding these points it is easy to see why the Supreme Court reached the decision it did in *Perma Life* and why that theory does not help Sweeney establish the existence of an unlawful agreement in this case. In neither *Perma Life* nor *Parke Davis* was there any question of the illegality of the agreement. That, however, is the precise issue which I must decide in this case. The Court in those cases was faced with agreements which contained provisions violative of the Sherman Act on their face. I am not. The hauling agreement between

Sweeney and Texaco contains nothing which on its face constitutes an agreement in restraint of trade. Only if the agreement resulted from a combination or conspiracy in restraint of trade would it violate § 1. Sweeney cannot establish the existence of the combination or conspiracy by merely establishing the existence of an otherwise lawful agreement. Neither *Parke Davis* nor *Perma Life* can provide the missing link: the evidence of combination or conspiracy. Those cases, together with the district court's opinion in *Fuchs* would only prevent Texaco from asserting the *in pari delicto* defense. They do not suffice to prove Sweeney's case.

B. 1971 COMBINATION CONSPIRACY—TERMINATION OF SWEENEY'S DISTRIBUTOR AGREEMENT

1. HORIZONTAL AGREEMENT

[19–21] Sweeney alleges that the testimony of one James P. Rodden, a former Texaco employee currently employed by a Sweeney enterprise, establishes the existence of a conspiracy between Texaco and other retailers to terminate Sweeney's distributor agreement.[45] At trial I allowed Sweeney to elicit testimony from Rodden on this subject and denied Texaco's motion to strike. (N.T. 464, 592–96). At oral argument on its motion for a directed verdict Texaco renewed its motion to strike Rodden's testimony and I again, denied it. I continue to stand by that ruling. That Rodden's testimony is admissible does not mean that it is admissible for all purposes however. I, like the jury, must consider testimony only for the purposes admitted. In this case Rodden's testimony of his own opinions, surmises, and hearsay, is admissible only to show Texaco's alleged motives for terminating Sweeney.[46] (*See* N.T. 592–96). However, as the

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[45] Rodden's testimony is not relevant to the existence of a conspiracy to reduce Sweeney's hauling allowance. On direct examination Rodden testified that prior to 1973 he was not aware of any discussion regarding the change in Sweeney's hauling allowance. (N.T. 421-22). Even after that time, Rodden was not aware of any occasions on which that was discussed at great length. (N.T. 423).

[46] I so ruled on several occasions. (*See e. g.* N.T. 413, 415).

court held in *Dart Drug Corp. v. Parke, Davis & Co.*, 120 U.S. App.D.C. 79, 344 F.2d 173 (1965), and recognized in *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), anticompetitive motivation without more, does not violate the Sherman Act.[47] *See United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

Rodden's testimony, while admissible, is so speculative on the issue of the relationship between the dealers' complaints and Texaco's actions that no reasonable jury could base a decision on it.[48] Since I would have had to exclude such evidence from the jury's consideration on the issue of conspiracy, *Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309,

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[47] Even if Texaco officials decided to terminate Sweeney because of his pricing practices and discussed the termination amongst themselves, Texaco would not have violated § 1. The plaintiff is not alleging that a corporation can conspire with itself. *See* note 43 and accompanying text, ***supra.***

[48] On cross-examination (by Texaco's counsel) Rodden testified as follows:

Q And, am I correct that it was Texaco's marketing philosophy that Texaco preferred its retailers price to be competitive with other service stations in their immediate area?

A Yes.

Q And, it was Texaco's marketing philosophy that it encouraged interbrand competition?

A Yes.

Q Do you know of any Texaco distributor who became aware of the reasons why Texaco terminated Sweeney, the Sweeney Company's distributor agreement?

A They—we—we don't know the reasons. I don't know the reasons today. We surmised what they thought the reason was.

(Following a colloquy between counsel and the court, the reporter read the question and answer back to the witness).

A In the answer which the court reporter has just read back to you, Mr. Rodden, to whom are you referring when you said we surmised?

A I would be referring to myself, the marketing reps that were in the Philadelphia district at that time, the marketing supervisors that were in the district at that time, the assistant district manager and the district manager.

Q All those people surmised the reasons?

A Yes, sir.

1312 (3d Cir. 1975), *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251, 1272 (S.D.N.Y. 1976), I cannot use it as the basis for denying Texaco's motion for a directed verdict. *See International Election Systems Corp. v. Shoup*, 452 F.Supp. 684, 709 (E.D.Pa. 1978), *aff'd* 595 F.2d 1212 (3d Cir. 1979). As the court held in *Harlem River Consumers:*

> [S]peculation and surmise may not support a jury verdict and may not substitute on this motion [for a directed verdict] for evidence of some kind that [the defendant] knowingly participated in any conspiracy which might have existed.

408 F.Supp. at 1272. While the jury could have used Rodden's testimony to corroborate other evidence of a combination or conspiracy, it could not use it as the sole support for its verdict.[49]

> Like the plaintiff in *Venzie*, Sweeney
> [H]ad the burden of adducing sufficient evidence from which the jury could conclude, on the basis of reasonable inferences and not on mere speculation, [the] defendants' [actions] were the product of concerted action . . .

Q Including yourself?

A To the best of my knowledge, I don't know of anyone of them that knows the fact or was told the fact why it was canceled, why Texaco took legal action.

Q And, does that include everyone to whom you spoke about the possible reasons for the termination of Sweeney's distributor agreement?

A Yes.

Q You haven't left anybody out?

A I believe I haven't, no.

(N.T. 462-467).

[49] It was the possibility of Sweeney's using Rodden's testimony as corroboration that led me to admit it in the first place. (*See* N.T. 464—66). I realized the difficulty of proving the existence of a conspiracy and did not wish to put obstacles in Sweeney's already tortuous path. However, deciding to admit the testimony to give Sweeney the benefit of every arrow in its quiver is different from ruling that an arrow that circles the victim can kill, as Sweeney would have me conclude.

521 F.2d at 1312. As the court of appeals reiterated in *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp., Inc.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978), the trial judge may direct a verdict "where such action is necessary to guard against a verdict founded solely on 'mere speculation.' " 579 F.2d at 25. That is precisely what I had to do in this case.

Other than Rodden's testimony Sweeney introduced no evidence with respect to the 1971 conspiracy which it had not already introduced to prove the existence of the 1970 conspiracy. It follows that given the inability of using Rodden's testimony to establish the existence of a conspiracy to terminate Sweeney in 1971, I must find that for the reasons stated in Part V A of this opinion, with respect to the 1970 conspiracy, Sweeney has failed to produce sufficient evidence to allow the jury to conclude that Texaco entered into a combination or conspiracy to terminate Sweeney's distributor agreement in 1971.

2. VERTICAL AGREEMENT

[22] Sweeney has also failed to introduce any additional evidence with respect to the existence of a vertical conspiracy in 1971. Indeed, with respect to this claim Sweeney has introduced evidence which makes the case so like *Fuchs* that my decision in this case follows from the court of appeals' decision in that case as inevitably as night follows day. In *Fuchs* the court of appeals thought it significant that the decision to terminate the general brokers "was a closely guarded secret within the Amstar corporation . . . ." 602 F.2d at 1031. Likewise, according to Rodden, Sweeney's own witness, the decision to terminate Sweeney was a closely guarded secret within Texaco, and those involved in reaching it were forbidden to discuss it with anyone outside Texaco. (N.T. 462–464). Moreover, Rodden testified that he did not know of anyone who had violated that directive (N.T. 463) or of any distributor who became aware of the reasons for the termination. (N.T. 464).

By further contrast to *Fuchs*, where Amstar's decision materially affected other general brokers, Texaco's decision to

terminate Sweeney had no effect on the marketing policies of other distributors. (N.T. 467–468). Indeed, Rodden testified that he did not know of "any instance where Texaco coerced Sweeney or any other Texaco distributor to refrain from dealing with Texaco service stations who engaged in vigorous price competition." (N.T. 461). Since the facts of this case are even more compelling than those in *Fuchs,* I have decided to follow the court of appeals' decision in that case.

This decision is supported by sound policy. Although we must give a plaintiff considerable latitude in proving his case due to the difficulties inherent in proving the existence of a conspiracy, we should not do so at the expense of penalizing a defendant who, under current law, has the right to unilaterally alter his practices as he sees fit. *See United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Venzie Corp. v. United States Mineral Products Co., Inc.,* 521 F.2d 1309, 1318 (3d Cir. 1975); *George W. Warner & Co. v. Black & Decker Mfg. Co.,* 277 F.2d 787 (2d Cir. 1960). As Professor Areeda has noted, "Once we recognize, however, that many cut-off dealers will harass their former suppliers with treble damage suits we might hesitate to scrutinize too closely the ambiguous refusal to sell that is not clearly employed to attain an end that could not lawfully be attained by direct agreement." *Areeda* Antitrust Analysis, 560 (1974). The Court of Appeals for the Third Circuit has refused to so emasculate *Colgate.* In the case at bar, I have concluded after close scrutiny that the facts proven would not allow a jury to find that Texaco entered into a combination or conspiracy in violation of § 1 of the Sherman Act.

VI. *SWEENEY'S CLAIM UNDER § 2 OF THE SHERMAN ACT*

Sweeney had also claimed that Texaco conspired and attempted to monopolize the market in Texaco gasoline in viola-

tion of § 2 of the Sherman Act. [50] Sweeney has failed to produce any evidence from which a jury could find that Texaco gasoline constitutes a product market for § 2 purposes.[51] Therefore, I directed a verdict in favor of Texaco on both of Sweeney's § 2 claims.

A. ATTEMPT TO MONOPOLIZE

[23] To establish a claim of monopolization or attempted monopolization the plaintiff must show that the defendant intended to acquire or maintain power in a relevant market, that it sought to do this by engaging in exclusionary practices, and in the case of attempt, that it had a dangerous probability of succeeding.[52] *American Tobacco Co. v. United States,* 328 U.S.

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[50] Section 2 of the Sherman Act imposes liability upon

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States, . . .

15 U.S.C. § 2.

[51] By letter of May 25, 1979, Sweeney agreed that to succeed on its § 2 claim the court must determine that Texaco gasoline is the relevant market. In this facet of the case Sweeney is not alleging that Texaco attempted to monopolize the market in gasoline generally or that Texaco conspired with other gasoline producers to do so. (*See* N.T. 81-84).

[52] In *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338, 1348 n. 17 (3d Cir. 1975), the court of appeals held that to establish a claim of attempted monopolization a plaintiff had to show that the defendant possessed sufficient market power to come dangerously close to success. In doing this the court relied on the Supreme Court's opinion in *Swift and Company v. United States,* 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905), and declined to follow the Court of Appeals for the Ninth Circuit which had held that a plaintiff could establish an attempt to monopolize in violation of § 2 without first establishing that the defendant controlled a particular share of the relevant market. *Greyhound Computer Corp. v. International Business Machines,* 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); *Lessig v. Tidewater Oil Co.,* 327 F.2d 459, 474-75 (9th Cir.), *cert. denied,* 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). *Cf. Mogul v. General Motors Corp.,* 391 F.Supp. 1305 (E.D.Pa. 1975), *aff'd* 527 F.2d 645 (3d Cir. 1976) (court noted split of authority on this issue but found that it did not need to resolve it).

781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Lorain Journal Co. v. United States,* 342 U.S. 143, 153, 72 S.Ct. 181, 96 L.Ed. 162 (1951); *Swift and Company v. United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905); *Coleman Motor Corp. v. Chrysler Corp.,* 525 F.2d 1338, 1348, (3d Cir. 1975); *Telex Corp. v. International Business Machines Corp.,* 510 F.2d 894 (10th Cir.), *cert. dismissed,* 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975).

[24] Sweeney has not even established the first element of a § 2 violation. Although it alleged that Texaco gasoline comprises a separate market which Texaco attempted to monopolize, it has failed to introduce any evidence on which a reasonable jury could base a decision in agreement with this contention.

[25] Defining the boundary of the relevant product market is the first step in determining whether a defendant has violated § 2. *United States v. Grinnell Corp.,* 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *United States v. E. I. DuPont & Co.,* 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Without such a determination it would be impossible to ascertain whether a defendant has or has attempted to acquire a monopoly. The problem of defining the market in which the defendant is accused of having or having attempted to obtain a monopoly is rarely an easy one to solve. Nonetheless courts have established some guidelines to aid in its resolution. In *United States v. DuPont & Co.,* 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956), the Court stated that:

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade of commerce,' monopolization of which may be illegal.

351 U.S. 395, 76 S.Ct. at 1007. As the court of appeals explained in *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978),

> The 'monopoly' condemned by § 2 of the Sherman Act inheres in 'the power to control prices or exclude competition.' To the extent that competition from related products limits the market power of an entity with a dominant position in one product, such an entity is less likely to be found to hold 'monopoly' power forbidden by law. This is so because the ongoing competition from other products guards against the ability of the dominant entity to increase prices and makes exclusionary tactics by such a party fruitless, impossible or unbearably expensive. Thus, in resolving the proportion of the 'market' controlled as a prelude to an examination of the extent of a firm's power to control prices or exclude competition, the courts look to the range of 'commodities reasonably interchangeable by consumers for the same purposes.'

579 F.2d at 26, *quoting United States v. E. I. DuPont & Co.*, 351 U.S. 377, 391, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (footnotes omitted). Looking to the range of commodities "reasonably interchangeable by consumers for the same purposes" as Texaco gasoline leads to the inescapable conclusion that Texaco gasoline does not represent a separate market for purposes of § 2. By Sweeney's own admission gasoline is a fungible commodity. Sweeney unhesitatingly bought gasoline from other refiners to sell to its stations. (N.T. 213-225). Through the testimony of its officers Sweeney also admitted that it had to compete with retail stations selling Texaco and other branded as well as unbranded gasoline and with distributors who sold Texaco and other branded as well as unbranded gasoline.[53] (N.T. 364-65, 476, 574-79).

Moreover, Sweeney introduced evidence to show that the price at which it sold Texaco gasoline depended on the price at

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[53] In *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 296 n. 17 (7th Cir. 1974), discussed *infra*, the court found these factors significant. In that case, as in this case, the defendant oil company provided "TVA's" to help dealers faced with competition from other stations. Although Sweeney did not seek damages as a result of disputes over TVA's, (N.T. 81–84) notation of their existence is, as in *Mullis*, appropriate.

which other distributors and retailers sold their gasoline. (*Id.*) Had Texaco gasoline been a separate product market, as Sweeney claims, changes in the price of Texaco gasoline would not have resulted in shifts in customer preference. Yet, according to the uncontradicted testimony of Sweeney's own witness, that is precisely what they feared and what happened.[54] (N.T. 476, 536-538). As the Court noted in *Dupont,*

> Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa.

351 U.S. at 392, 76 S.Ct. at 1005. Since it is clear that Texaco did not have control over price it could not have had control over competition. Thus, Sweeney's evidence permits only one conclusion: Texaco gasoline was easily interchangeable with other gasoline and did not constitute a separate product market.

Justice, then Judge, Stevens, reached the same conclusion in a very similar case, *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974). The plaintiff in *Mullis* was a distributor of the defendant's products. After Arco terminated his distributor agreement the plaintiff brought an action alleging *inter alia* that Arco had violated § 2 of the Sherman Act. As in this case, the plaintiff needed to establish that the Arco products formed the market which the defendant sought to monopolize. The court, however, refused to find that Arco gasoline was the relevant market and reversed the district court's issuance of an order enjoining the defendant from refusing to supply the plaintiff with Arco products.[55] 502 F.2d at 296-97.

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[54] *See* note 70, *infra.* Neither Sweeney nor Texaco introduced expert testimony on this issue of cross-elasticity of demand for Texaco gasoline. The jury would have had to evaluate the testimony of Sweeney's lay witnesses to arrive at a decision, and I must decide whether this testimony taken as a whole would support a verdict in Sweeney's favor. It is for that reason that I must analyze the inferences which reasonable people could have drawn from the evidence presented.

[55] Sweeney claims *Mullis* has no application to this case because that case arose out of the 1973 gasoline shortage. Sweeney argues that the

Like Sweeney the plaintiff in *Mullis* had argued that its inability to secure an alternative source of supply compelled the conclusion that the relevant market included only the defendant's products.[56] The court disagreed. It reasoned that,

> The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased. For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of *competition,* not *competitors.*' And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury.

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market definition decided therein could have no bearing on a case such as this, where the effects of a shortage were not in issue. That argument ignores the basis of the court's opinion, however. Before deciding the issue of the effect of the shortage, the court was at pains to point out that it was,

> [F]irst appropriate to identify the reasons why plaintiff's § 2 claim would be manifestly insufficient if there had been no shortage, and then to consider the relevance of the shortage.

502 F.2d at 295. Only after deciding that Arco gasoline did not constitute a relevant market under normal circumstances did the court go on to consider the effect of the shortage. The court nonetheless concluded that an energy shortage with the attendant regulatory controls imposed on oil companies would not justify a redefinition of the relevant market. 502 F.2d at 298. On the contrary, insofar as a shortage increased the "cross-elasticity of demand" the relevant market would tend to increase, not decrease in size. *Id. Consumers Oil Co. v. Continental Oil Co., Inc.*, 1979–1 Trade Cases ¶ 62,596 at 77,434–35 (D.Minn.1979). I will not discuss the effects of a shortage in more detail because Sweeney in its Memorandum in Response to Texaco's Motion for a Directed Verdict stated that "plaintiff has not relied on the fact of shortage in any way concerning its Section 2 count . . . ." at 11.

[56] In considering this argument the *Mullis* court first evaluated the evidence in the record and then decided whether the existence of an energy crisis would affect that analysis. 502 F.2d at 297.

502 F.2d at 298-99, *quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962) (footnote omitted; emphasis in original). Yet such arbitrary segregation is precisely what Sweeney seeks. Like the court in *South End Oil Co. v. Texaco Inc.,* 237 F.Supp. 650 (N.D.Ill. 1965), I cannot hold that a jury could find that Texaco gasoline constitutes a distinct product market.

In *South End* the plaintiff, a Texaco distributor, brought an action against Texaco alleging a violation of § 2 of the Sherman Act. To succeed on its claim the plaintiff had to establish that Texaco motor oil formed a separate market. The court granted summary judgment for the defendant and held that

> As a legal proposition, plaintiff's monopolization argument cannot be sustained. The product market cannot be restricted in the manner in which [plaintiff] suggests, . . . Where commodities are competitive and reasonably interchangeable, the relevant market cannot be confined to the products of one manufacturer.

237 F.Supp. at 655-56 (citation omitted). In this case, as in *South End,* Sweeney's witnesses testified that Texaco gasoline was competitive and interchangeable with other gasoline. In the absence of any evidence of the uniqueness of Texaco gasoline the jury could not have concluded that, contrary to the teachings of *Mullis* and *South End Oil,* Texaco gasoline represents a separate product market.

[26] Sweeney has also argued that the existence of the Texaco trademark provides the necessary evidence of the existence of a separate market. This contention is without merit and has been repeatedly rejected. *United States v. E. I. DuPont & Co.,* 351 U.S. at 393, 76 S.Ct. 994; *Fount-Wip, Inc. v. Reddi-Wip, Inc.,* 568 F.2d 1296, 1301 (9th Cir. 1978); *Merit Motors, Inc. v. Chrysler Corp.,* 417 F.Supp. 263, 269 (D.D.C.1976), *aff'd,* 187 U.S.App.D.C. 11, 569 F.2d 666 (1977); *Mogul v. General Motors Corp.,* 391 F.Supp. 1305, 1313 (E.D.Pa. 1975), *aff'd,* 527 F.2d 645 (3d Cir. 1976); *ALW, Inc. v. Unit-*

ed Air Lines, Inc., 510 F.2d 52, 56 (9th Cir. 1975); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F.Supp. 453 (W.D.Pa. 1968), *aff'd*, 417 F.2d 622 (3d Cir. 1969); *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U.S.App.D.C. 161, 163, 243 F.2d 418, 420, *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957); *Wales Home Remodeling Co., Inc. v. Alside Aluminum Corp.*, 443 F.Supp. 908 (E.D.Wis. 1978); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.Supp. 110, 120-22 (E.D.N.Y.1976). *See Columbia Metal Culvert, Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27, n.11 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978).

As the Court noted in *DuPont*,

> [O]ne can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

351 U.S. at 393, 76 S.Ct. at 1006 (footnotes omitted). The Court of Appeals for the Third Circuit has followed these teachings. In *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978), it noted that

> The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. . . . stifling intra-brand competition may violate § 1, while 'monopoly' over a given brand would *clearly* not run afoul of § 2.

579 F.2d at 27 n.11 (citation omitted) (emphasis added). In the same vein, another court has remarked that

> A manufacturer has a 'natural monopoly over his

> own products, especially when the products are sold under trademark. . . .' *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344 (9th Cir. 1970). See *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Unless the manufacturer used his natural monopoly to gain control of the relevant market in which his products compete, the antitrust laws are not violated.

Bushie v. Stenocord Corp., 460 F.2d at 120 (9th Cir. 1972).

In light of these holdings and in the absence of any evidence to the contrary I have no choice but to reject Sweeney's argument on the relevance of Texaco's trademark. Indeed, other courts have gone even further and taken judicial notice that the relevant product market cannot be limited to the defendant's trademark. *Mogul v. General Motors Corp.*, 391 F.Supp. 1305, 1313 (E.D.Pa.1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976).[57]

B. CONSPIRACY TO MONOPOLIZE

[27] The evidence introduced to establish a conspiracy to violate § 2 is identical to that which Sweeney introduced to establish a conspiracy to violate § 1. (See Part V, *supra*). Just as that evidence did not suffice to permit the jury to find that such a conspiracy existed, it cannot suffice here.[58] Absent evi-

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[57] In *Mogul* the court held that Cadillac, a brand which was alleged to be specifically associated with luxury automobiles, did not represent a separate market because it was interchangeable with other luxury automobiles as well as less expensive automobiles. Furthermore, the court noted that the Cadillac division of the defendant did not have the power to fix prices. It has not even been contended in this case that Texaco has the power to fix retail gasoline prices and my decision follows *a fortiori* from *Mogul*. Clearly, Texaco gasoline is more interchangeable with other gasoline than Cadillac automobiles are with other automobiles. I could almost take judicial notice of the fact that it would be easier to persuade regular Texaco customers to buy, for example, Exxon instead of Texaco gasoline than to persuade a regular Cadillac customer to drive a Chevette instead of a Cadillac.

[58] Ironically, what little evidence Sweeney introduced on this issue supports Texaco's position. (N.T. 462).

dence of a conspiracy Sweeney's § 2 claims must fail. *See Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1070 (3d Cir. 1979). Moreover, even if Sweeney succeeded in establishing the existence of a conspiracy, his § 2 claim would fail for failure to show that Texaco gasoline constituted a separate market, and without such a showing no violation of § 2 can occur. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *United States v. E. I. DuPont & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). (*See* Part VI A, *supra*).

VII. *SWEENEY'S CLAIM UNDER § 2 OF THE ROBINSON–PATMAN ACT*

Sweeney claims that by changing its hauling allowance to provide for the Macungie to Pottstown rate, Texaco discriminated against it in violation of the Robinson-Patman Act.[59] It seeks damages equal to the difference between the Westville to Pottstown and the Macungie to Pottstown hauling allowance.[60] However, neither Sweeney nor any other Robinson-Patman plaintiff can recover damages on such a theory.

[28–32] To succeed on a Robinson-Patman claim a plain-

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[59] Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in part,

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . .

[60] Sweeney seems to have asserted this as its measure of damages in its latest submission to the court. Thus, in its Response to Defendant Texaco, Inc.'s Motion for a Directed Verdict Sweeney states that,

> The hauling allowance differential, that is, between Sweeney's old rate and new rate, is greater than the difference between his hauling allowance and of [sic] his competitors' hauling allowances. However, since Sweeney was forced to absorb the loss in order to meet the com-

tiff must prove at least four things. First, he must prove that there was a difference in the price charged him and his competitors for a particular item at a particular time.[61] Second he

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petition, it accurately *includes the* discriminated amount. . . .

Plaintiff has demonstrated *damage* which *includes* the differential between the favored wholesalers price and his price. Therefore, he should be entitled to recover the damages based on the difference.

At 19–20 (emphasis added). It is extremely unclear from this language which difference Sweeney is seeking damages for. However, since Sweeney refers to a sum of damages which *includes* another, I assume that it seeks damages based on the larger sum. The issue is complicated by Sweeney's representation on the first day of trial that it was changing its damage theory and now claimed damages for the difference between its hauling allowance and that of its competitors. (N.T. 63–81, 332–340). This unnecessary equivocation demonstrates some of the difficulties presented by plaintiff's lack of certainty about the content of its allegations. However, it is irrelevant to the outcome of the case, since Sweeney has failed to provide sufficient evidence to sustain an award of damages based on either measure. *See* note 66, *infra*.

[61] An issue that arises in the context of this requirement is the appropriate definition of price. Thus, functional discounts do not comprise part of the price for Robinson-Patman Act purposes, and differences in them are not forbidden by § 2(a). *McCaskill v. Texaco Inc.*, 351 F.Supp. 1332, 1340 (S.D.Ala.1972), *aff'd*, 486 F.2d 1400 (5th Cir. 1973); *Refrigeration Engineering Corp. v. Frick Co.*, 370 F.Supp. 702, 713 (W.D.Tex. 1974); *Report of The Attorney General's Committee to Study the Antitrust Laws*, 202–204 (1955). Texaco has claimed that the hauling allowance is a functional discount because it represents a payment for services rendered. Since it is undisputed that excluding the hauling allowance all Texaco distributors in Pennsylvania and New Jersey pay the same price per gallon for Texaco gasoline, Texaco claims that Sweeney has failed to show a difference in price. On the other hand, Sweeney claims that the hauling allowance is not a functional discount because it often bears no relationship to the distance over which the gasoline is hauled. Since there was evidence of instances where Texaco knew of distributors who were not hauling their gasoline to the place upon which their allowance was based, I agree with Sweeney on this issue (*e. g.* N.T. 1026, 1245). I therefore find that the jury could conclude that the hauling allowance is part of the price for Robinson-Patman Act purposes, *Guyott Co. v. Texaco, Inc.*, 261 F.Supp. 942 (D.Conn.1966), *see Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945), and that the difference between Sweeney's hauling allowance and that of its competitors constituted discrimination violative of § 2(a) of the Robinson-Patman Act.

must prove that at least one of the purchases involved occurred in commerce.[62] Third, he must prove that the discrimination could injure competition.[63] Fourth, he must prove that he was injured as a result of the discrimination.[64] The jury could find that Sweeney has met all but the fourth requirement.[65]

[33] In support of its claim that it was injured as a result of the alleged price discrimination Sweeney cites *Fowler Manufacturing Co. v. Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d 503 (1970). In *Fowler* the court of appeals held that the amount of the discrimination can serve as the basis and measure of damages under the Robinson-Patman Act. Sweeney therefore argues that it needs to do nothing more than establish the discrimination to succeed on this claim.[66] After reviewing *Fowler* and cases de-

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[62] Texaco claims that Sweeney has failed to meet this requirement, which is more stringent than that of the Sherman Act. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). However, the resolution of that issue involves disputed questions of fact which should be decided by a jury. Therefore, for purposes of deciding Texaco's motion for a directed verdict I will assume that a jury would find that Sweeney is correct on this issue and that it has met the jurisdictional requirement of § 2(a).

[63] There is no serious question that Sweeney has produced sufficient evidence to allow a jury to find that it has met this requirement. As the largest Texaco distributor in the area Sweeney's price increases could allow other distributors to do likewise. Such a result could injure competition.

[64] The circuits appear to be divided on the interpretation of this requirement. *Compare e. g. Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957), with *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S.Ct. 571, 24 L.Ed.2d (1970). The effect of this split will be more fully discussed *infra.*

[65] *See* notes 61–63, *supra.*

[66] However, even if Sweeney were correct in its assertion that *Fowler* sets forth the standard applicable to this case, it is not clear that the difference between the Westville to Pottstown and the Macungie to Pottstown rates would be the proper measure. Sweeney has charged Texaco with giving Sweeney's competitors a larger hauling allowance than Texaco has given Sweeney. Even if this were true it does not follow that

cided before and after it, I find that it does not represent the law of this circuit and probably would not represent the law of the Ninth Circuit today.

As Texaco points out, the *Fowler* court based its decision on *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945), a case which the very court which decided it later limited and refused to follow. *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 54, 60 (8th Cir. 1951). Moreover, *Fowler* appears to contravene the principles announced by the Supreme Court in cases decided after it. Thus in *Perkins v. Standard Oil Co.*, 395 U.S. 642, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969), a case brought by a distributor against his supplier, the Court held that

> Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered.

395 U.S. at 648, 89 S.Ct. 1871 at 1874. To hold as the court did in *Fowler* that a plaintiff need only prove discriminaton, would run afoul of the Court's directive to require proof of a connection between the discrimination and the injury. For purposes of this motion I am assuming that Sweeney has proven discrimination,[67] but Sweeney has introduced absolutely no evidence of injury.

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to put Sweeney and its competitors on a parity Texaco would have to pay Sweeney the Westville to Pottstown rate. Indeed, payment to Sweeney of the Westville to Pottstown rate might itself violate the Robinson-Patman Act by giving Sweeney an undue advantage over its competitors. Thus it appears to me that even under *Fowler* Sweeney could recover, at most, the difference between the Macungie to Pottstown hauling allowance and the hauling allowance given its competitors, as it claimed prior to filing its response to Texaco's motion for a directed verdict. (N.T. 63, 332–340). *See* note 60, *supra*. Since I have decided that *Fowler* does not represent the law of this circuit, however, I do not need to decide this issue. See notes 21 and 60 *supra*.

[67] *See* note 65 and accompanying text, *supra*.

More recently, in *Brunswick Corp. v. Pueblo Bowl–O–Mat Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), a case brought pursuant to § 7 of the Clayton Act, 15 U.S.C. § 18, the Court affirmed and even expanded the principles which it had announced in *Perkins*. In *Brunswick* the Court held that to recover,

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489, 97 S.Ct. at 697 (emphasis in original). As one commentator has noted, *Brunswick* shows

> [T]hat cognizable injury in a section 2(a) case is to be traced *not* to the higher price paid by the plaintiff (the overcharge)—since the infraction is a price *difference* and all the law requires of the seller is a parity in pricing—but rather to the *undercharge* to plaintiff's competitor. . . . It is the harm from the discrimination, that is, the undercharge and not from the overcharge which constitutes antitrust injury in the *Brunswick* sense. (emphasis in original).

Handler, *Changing Trends In Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum.L.Rev. 979, 993 (1977). Texaco has therefore taken the position that *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957), not *Fowler*, defines the measure of damages applicable to this case.

In *Enterprise* the plaintiff, a gasoline station operator, brought an action against its supplier alleging that the rebates which the supplier had given plaintiff's competitors during a price war were larger than the rebates which the defendant had given plaintiff. The district court accepted the difference between the price charged plaintiff and the lowest price charged any of his competitors as the appropriate measure of plaintiff's dam-

ages.[68] That is precisely what Sweeney would have this court do. The court of appeals, however, reversed the district court's award of treble damages to the plaintiff and dismissed the complaint. The court, in an opinion written by Judge Learned Hand, reasoned that

> [E]ven though we were to agree that the finding was right, and that for that reason the plaintiff had proved its claim for relief, we do not think that it proved the amount of its damages, or indeed that it suffered any damages at all. . . . [Plaintiff's] gross loss was the profit on any sales that it would have made to [its] competitors' customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors.

240 F.2d at 458. The *Enterprise* court analyzed both prior Supreme Court cases and the legislative history of § 2(a) to arrive at this formulation. The court thus reviewed the Court's opinion in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947), and finding it distinguishable chose to rely on *Interstate Commerce Commission v. United States*, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273 (1933), instead.

As Judge Hand explained, in *Interstate Commerce Commission*, a case which did not purport to construe the Robinson-Patman Act, Justice Cardozo had noted that

> When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .
>
> Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other

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[68] The district court had, like the *Fowler* court, relied on *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.24 988 (8th Cir.), *cert. denied*, 326 U.S. 733, 66 S.Ct. 231, 90 L.Ed. 467 (1945).

> evidence of loss. . . . But a different measure of recovery is applicable 'where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less.' *So. Pac. Co. v. Darnell-Taenzer Co., supra.* Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less. . . . The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.
>
> . . . If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more.

289 U.S. 389-91, 53 S.Ct. at 609-610 (citations omitted).

[34] The *Enterprise* court further noted that although the Robinson-Patman Act contained a provision which would have made the amount of the discrimination the measure of damages as originally passed by the Senate, that provision was specifically eliminated in conference. 240 F.2d at 460. The court therefore concluded that Congress did not intend that the amount of the discrimination be the measure of damages. Like many other courts, I agree.[69]

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[69] Courts in the Fourth, Fifth, Sixth, and Tenth Circuits have followed *Enterprise. Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964); *Dantzler v. Dictograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962), *cert. denied*, 372 U.S. 970, 83 S.Ct. 1097, 10 L.Ed.2d 133 (1963); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961); *Alexander v. Texas Co.*, 165 F.Supp. 53 (W.D.La.1958); *Lombino & Sons, Inc. v. Standard Fruit & Steamship Co.*, 1975–2 Trade Cases ¶ 60,527 at 67,329 (S.D.N.Y.1975); *Krieger v. Texaco Inc.*, 373 F.Supp. 108, 112–13 (W.D.N.Y.1972); *McCaskill v. Texaco Inc.*, 351

Courts in this district have applied the *Enterprise* doctrine and received the approval of the Court of Appeals for the Third Circuit even though that court has not explicitly ruled on the issue. Thus in *Freedman v. Philadelphia Terminals Auction Co.*, 197 F.Supp. 849 (E.D.Pa.1961), *aff'd*, 301 F.2d 830 (3d Cir.), *cert. denied*, 371 U.S. 829, 83 S.Ct. 40, 9 L.Ed.2d 67 (1962), a case brought pursuant to § 2(c) of the Robinson-Patman Act, Judge Van Dusen relied on *Enterprise* and the legislative history of § 2(a) to conclude that

> Plaintiffs had no automatic right to recover the terminal charges without proof of loss, even if a violation of the Robinson-Patman Act had been found to have existed.

197 F.Supp. at 852. The judge then denied the plaintiff's motion for judgment notwithstanding the verdict and new trial. The court of appeals affirmed.

[35, 36] More recently Judge Huyett, in *Kelly v. General Motors Corp.*, 425 F.Supp. 13 (E.D.Pa.1976), relied on *Enterprise* to "reject the suggestion by plaintiff that his damages will be the amount of the price difference." 425 F.Supp. at 20. That the issue of damages arose in the context of a class certification motion does not diminish the importance of the court's resolution of it. Indeed, the difficulty of ascertaining damages under *Enterprise* was one of the reasons for the court's refusal to certify a class. *Id.* Since there is no evidence of how many customers Sweeney lost to competitors as a result of the alleged discrimination, as required by *Enterprise*,[70] Sweeney

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F.Supp. 1332, 1341 (S.D.Ala.1972), *aff'd*, 486 F.2d 1400 (5th Cir. 1973). Courts in the Second Circuit continue to adhere to it. *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24 (2d Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350 (S.D.N.Y.1978). Indeed, of the circuits that have ruled on the issue only the Ninth Circuit has adopted a rule at variance with that of *Enterprise*. (But note that *Fowler* was decided more than ten years before *Enterprise*).

[70] Although there was some testimony to the effect that Mission Oil Co. and Petroleum Products Co., two of the plaintiffs in this case, bought

has failed to provide a basis upon which the jury could determine the extent of injury, if any, which Sweeney suffered as a result of any price discrimination in which Texaco may have engaged.

[37] Sweeney claims, however, that the *Enterprise* court, relying on *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947), excepted from its own rule cases where the plaintiff absorbed the amount of the discrimination and did not pass it on to the consumers. Whatever the validity of this exception, there is no reason to apply it here. Sweeney has not produced any evidence from which a reasonable jury could conclude that Sweeney absorbed the amount of the discrimination, however computed.[71] The only evidence which addressed the issue is simply too vague to serve as the basis for an award of damages.[72]

Due to Sweeney's failure to show any injury as a result of Texaco's alleged violation of § 2(a) of the Robinson-Patman Act or produce any basis on which the jury could compute its alleged damages, there was no need to submit the issue of liability to the jury. *See Enterprise Industries v. Texas Co.*, 240 F.2d 457, 460 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957).

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from Grace Oil, one of Sweeney's competitors, on occasion because Grace could give them a better price than Sweeney could, (N.T. 536–538) Sweeney has not asserted those purchases as the basis for its damages. (*see* Plaintiffs Response to Defendant Texaco, Inc.'s Motion for a Directed Verdict, at 17), perhaps because to do so would make it impossible for Sweeney to argue that it absorbed the increase in the hauling allowance, as it has sought to do so. *See* note 72, *infra*. Nevertheless, such testimony is so general and inconclusive as to be incapable of forming the basis for a jury determination of the amount of Sweeney's damages. Therefore, such testimony does not suffice to allow the jury to establish the existence of an injury as required by the *Enterprise* doctrine.

[71] See note 66 *supra* for a discussion of the difficulties with Sweeney's measure of the price discrimination to which it claims to have been subjected. *See also*, note 70, *supra*.

[72] The only evidence which Sweeney cites in support of the applicability of the *Bruce's Juices* exception is the following testimony of Mr. Sweeney.

VIII. *TEXACO'S FIRST AND SECOND COUNTERCLAIMS AGAINST SWEENEY*

[38-40] Texaco has asserted two counterclaims against Sweeney which the parties agreed to submit to the court for decision based on their written briefs. (N.T. 1863, 1867 1891). Texaco claims that Sweeney commingled Texaco gasoline with non-Texaco gasoline, sold non-Texaco gasoline and

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By plaintiff's counsel:

Q And, what, if any, effect did that change have on Sweeney's business or profitability?

A Increased my cost by the amount of points that the freight rate was decreased.

Q Did that have an effect on the profitability of Sweeney?

A Yes.

Q What was the effect?

A It reduced the profit Sweeney was making at the various locations

Q By what amount?

A By the amount of freight rate that was decreased.

Q Why was that?

A Why was that. Because it increased our costs by that amount of money.

(N.T. 191, *See* Plaintiffs' Response to Defendant Texaco, Inc.'s Motion for a Directed Verdict at the Close of Plaintiffs' Evidence at 19). It does not follow from this testimony that Sweeney absorbed the increase in the freight rate. First, the increase in the hauling allowance may have raised costs because it resulted in increased prices and reduced volume. (*But see* Plaintiffs' Exhibit 109). Second, there was testimony to the effect that two of Sweeney's customers bought from one of Sweeney's competitors on occation because that competitor could give them a better price. (N.T. 536–538). *See* note 70, *supra*. This can only suggest that Sweeney did indeed pass on some of the increase. The jury would have had absolutely no evidence from which it could ascertain what portion of the increase Sweeney absorbed. A verdict, particularly in a case of this magnitude, cannot be founded on the unsupported generalizations of an individual who can make no claims to knowledge of the specific financial condition of a business in which he is no longer an active participant. To hold that by making conclusory, unsubstantiated statements about the economic effect of the defendant's actions a plaintiff can establish that it absorbed any price increase and thus comes within the *Bruce's Juices* exception would emasculate the *Enterprise* doctrine. It would make it possible for any plaintiff to say the magic words and have his case submitted to the jury. That would amount to overruling *Enterprise* and the cases in which courts have followed it. Absent some indication that the court of appeals

diesel fuel as Texaco gasoline and diesel fuel, and used Texaco marked trucks to deliver non-Texaco gasoline. According to Texaco these actions violated Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a),[73] Section 1 of the New Jersey Fair Sales Act, N.J.Stat. Ann. § 56:41-1

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wishes to adopt *Fowler* as the law of this circuit, I will not do so. A litigant should not be permitted to accomplish indirectly (by making bald unsupported allegations designed to bring him within the *Bruce's Juices* exception) what he could not accomplish directly (receive the amount of the discrimination as his damages). As long as *Enterprise* is the law of this circuit a plaintiff must show a specific, competitor by competitor breakdown of the damages he has incurred as a result of the alleged discrimination before he can recover. Sweeney has clearly failed to do that in this case. *See* note 24, *supra*.

[73] Section 32(1) of the Lanham Act provides:

> Any person who shall, without the consent of the registrant—
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.
>
> shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1114(1).

Section 43(a) of the Lanham Act provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated,

(West),[74] Section 2(g) of the New Jersey Unfair Motor Fuels Practices Act, N.J.Stat.Ann. § 56:6-2(g),[75] the common law of unfair competition, and constitute a breach of Sweeney's distributor agreement.[76] (Plaintiffs' Exhibit 4).[77] After the court directed a verdict for Texaco, Texaco withdrew its claim for

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or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a).

[74] Section 1 of the New Jersey Fair Sales Act provides:

No merchant, firm of corporation shall appropriate for his or their own use a name, brand, trade-mark, reputation or good will of any matter in whose product such merchant, firm or corporation deals.

N.J. Stat.Ann. 56:4–1.

[75] Section 2(g) of the New Jersey Unfair Motor Fuel Practices Act provides that:

All above-ground equipment for storing or dispensing motor fuel operated by a retail dealer shall bear, in a conspicuous place, the name or trade-mark of the product stored therein or dispensed therefrom, and no retail dealer shall permit delivery into underground or above-ground containers, tanks or equipment any motor fuel other than the brand represented or designated by the name or trade-mark appearing on such container or dispensing equipment attached thereto. No retail dealer shall be a party to the substitution of one grade of motor fuel for another.

N.J.Stat.Ann. 56:6–2(g).

[76] This court has jurisdiction of Texaco's state law claims because the parties are of diverse citizenship (Texaco is a Delaware corporation with its principal place of business in New York, Sweeney is a Pennsylvania corporation with its principal place of business in Pennsylvania, Mission is a New Jersey corporation with its principal place of business in New Jersey, and Petroleum is a partnership none of whose partners are citizens of either Delaware or New York) and the amount in controversy, even if measured by the value of Texaco's claims for injunctive and declaratory relief, exceeds $10,000. Even if this were not the case this court would have jurisdiction over the state law claims pursuant to the doctrine of pendent jurisdiction; the facts involved in the state and Lanham Act claims not only arose from a common nucleus but are indeed identical. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

[77] The distributor agreement expressly provided that Sweeney "shall not sell products purchased from others under the trademarks or brands of [Texaco] and shall not mix [Texaco's] products one with another mix or adulterate [Texaco's] products with those of others." (Plaintiffs' Exhibit

damages on its counterclaim and, through its counsel, stated that it would seek only injunctive and declaratory relief.[78] (N.T. 1864).

A. LIABILITY

[41, 42] After the court ruled on Texaco's motion for a directed verdict the parties agreed to submit the issues presented by Texaco's counterclaims to the court.[79] At that time, faced

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4, page 4). Nevertheless, Sweeney argues that Texaco has waived any breaches by Sweeney because it has continued to supply Sweeney until the present time. An examination of the facts reveals the absence of any merit in that argument. Thus, Texaco objected to the breach and in 1971 terminated Sweeney's 1963 distributor agreement as a result of it. (*See* notes 13 and 20 and accompanying text, *supra*). Texaco never reinstated that distributor agreement. The agreement pursuant to which Texaco continued to supply Sweeney after 1971 was an informal agreement which provided that Texaco could cease to supply Sweeney upon ten days' notice. (Defendant's Exhibit 68A; *see* note 13 and accompanying text, *supra*). Since 1973 Texaco has had no choice but to supply Sweeney pursuant to federal regulations, and in any event, claims (without dispute from Sweeney) that it did not know of the violations until the advent of discovery in this litigation. The record clearly shows that after it learned of Sweeney's breach Texaco attempted to resolve the matters without resorting to litigation. *Id.* It would be a perversion of the policy of encouraging litigants to resolve their differences amicably for me to hold that unsuccessful attempts at a friendly resolution extinguish the underlying claims. I will not so hold.

[78] Texaco had previously agreed to limit its damage claim to the amount of any judgment entered against it upon Sweeney's antitrust claims. *See* note 20, *supra*. Since Texaco originally sought damages Sweeney's argument that Texaco's failure to seek damages vitiates its breach of contract claim is totally without merit. To succeed on its claim as presently before this court Texaco needs to show that a breach occurred and that continuation of that breach will result in harm to it. Whether Texaco wishes to receive compensation for any damage already incurred as a result of that breach is irrelevant to its entitlement to prospective relief. The courts will not encourage the sort of greediness and litigiousness which acceptance of Sweeney's position would foster.

[79] Since this issue has been submitted to the court for decision (N.T. 1890–91), I sit as the trier of fact, unlike my role in deciding Texaco's motion for a directed verdict. I only need to find that Texaco, who has the burden of proving its counterclaims, has indeed proved them by a preponderance of the evidence.

with its client's own admissions of commingling (N.T. 203-225), and uncontroverted evidence introduced by Texaco, (Defendant's Exhibits 55, 435A-K) Sweeney agreed that the only issue remaining for the court's decision was whether Sweeney's breach of contract or Lanham Act violations were excused by like conduct on the part of Texaco. (N.T. 1872-73, 1890-91).[80]

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[80] After the court granted Texaco's motion for a directed verdict on Sweeney's antitrust claims, the following colloquy took place between the court and counsel for Sweeney:

THE COURT: It is pretty clear that Sweeney Company breached its contract and admits in effect.

MR. KRAMER: Sweeney never denied that it sold.

THE COURT: The question is is it excused because of commingling by Texaco?

MR. KRAMER: That's right.

THE COURT: . . . The posture of the case is that there's an admitted breach of contract or an admitted Lanham Act violation by Sweeney, and the question is, is it excused by like conduct on the part of Texaco, is that right?

MR. KAPUSTIN: Or under the breach of contract claim [against Texaco] or any other reason that's available for excuse of breach of contract.

(N.T. 1872–1890). Sweeney appears to have changed its position and now seems to argue that there is no evidence of a breach on its part. (*See* Plaintiff's Memorandum in Opposition to Texaco's Second and Third (sic) Counterclaims). The record is overwhelmingly against Sweeney on this issue. (*See e.g.*, N.T. 202–25, 299–320, 1434, 1557–81, 1594–96, 1740–75; Plaintiffs' Exhibits 61, 64, 65, 66, 72, 78; Defendant's Exhibits 75, 435a–435k, 432a, 436b, 440). Therefore, I will not belabor the reasons for which I find that even if Sweeney does not admit to having breached its distributor agreement with Texaco or violated the Lanham Act it is the ruling of this court that Sweeney's actions did indeed constitute a breach of its distributor agreement with Texaco and a violation of §§ 32(1) and 43(a) of the Lanham Act, § 1 of the New Jersey Fair Sales Act § 2(g) of the New Jersey Unfair Motor Fuel Practices Act, and the common law of unfair competition. *See*, *Freed Oil Co. v. Quaker State Oil Refining Corp.*, 419 F.Supp. 479, 493 (W.D.Pa. 1976); *Villager, Inc. v. Dial Shoe Co.*, 256 F.Supp. 694, 700–703 (E.D.Pa.1966), on the § 32(1) Lanham Act violations; *Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004, 1012–13 (5th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 132, 46 L.Ed.2d 98 (1975); *Freed Oil, supra; International Election Systems*

Sweeney thus took the position that the record showed that Texaco had purchased gasoline from other refiners which it then sold to Sweeney as Texaco gasoline. Since Texaco acted *in par delicto,* Sweeney maintains it is not entitled to relief for Sweeney's violations.

[43] Sweeney's argument is without merit. Texaco agreed to provide Sweeney with Texaco branded gasoline, and that is precisely what it did. Just what constitutes Texaco branded gasoline is a matter for Texaco in its discretion to determine.

Courts have long recognized that a manufacturer need not itself manufacture every product to which it attaches its trademark. As the Supreme Court explained in *Menendez v. Holt,* 128 U.S. 514, 9 S.Ct. 143, 32 L.Ed. 526 (1888),

> The fact that Holt & Co. were not the actual manufacturers of the flour upon which they had for years placed the brand in question does not deprive them of the right to be protected in the use of that brand as a trade-mark.
>
> They used the words 'La Favorita' to designate flour selected by them, in the exercise of their best judgment, as equal to a certain standard. The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. It did not, of

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Corp. v. Shoup, 452 F.Supp. 684, 712–13 (E.D.Pa.1978), *aff'd,* 595 F.2d 1212 (3d Cir. 1979), on the § 43(a) Lanham Act violations; *Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc.,* 194 U.S.P.Q. 157 (D.NJ.1977); *Clairol Inc. v. Cosmetics Plus,* 130 N.J.Super. 81, 325 A.2d 505 (Chanc.Div.1974), on the § 1 New Jersey Fair Sales Act violations; and *Surgical Supply Service, Inc. v. Adler,* 321 F.2d 536, 539 (3d Cir. 1963); *Scott Paper Co. v. Scott's Liquid Gold, Inc.,* 439 F.Supp. 1022, 1034–37, 1039–40 (D. Del.1977), *rev'd on other grounds,* 589 F.2d 1225 (3d Cir. 1978); *Freed Oil Co. v. Quaker State Oil Refining Corp.,* 419 F.Supp. 479, 493 (W.D.Pa. 1976). Note that contrary to Sweeney's assertions, pursuant to N.J.Stat.Ann. § 56:6–25, actions to restrain violation of § 2(g) are not limited to suits against retail dealers.

> course, in itself indicate quality, for it was merely a fancy name, and in a foreign language, but it evidenced that the skill, knowledge, and judgment of Holt & Co. had been exercised in ascertaining that the particular flour so marked was possessed of a merit rendered definite by their examination, and of uniformity rendered certain by their selection.

128 U.S. at 520, 9 S.Ct. at 143-144. Courts have continued to follow this reasoning.

In *Victor Tool & Machine Corp. v. Sun Control Awnings, Inc.*, 299 F.Supp. 868 (E.D.Mich. 1968), *aff'd*, 411 F.2d 792 (6th Cir. 1969), the court noted that,

> The use of a trademark, however, does not necessarily and as a matter of law impart that the articles on which it is used are manufactured by its user. It is enough that they are manufactured for him, that he controls their production, or that they pass through his hands in the course of trade and that he gives to them the benefit of his reputation or of his name and business style. *Feather Combs, Inc. v. Solo Products Corp.*, 2d Cir., 306 F.2d 251, cert. den. 371 U.S. 910, 83 S.Ct. 253, 9 L.Ed.2d 170 (1962).

299 F. Supp. at 874.

[44] Thus, the validity of Texaco's position does not depend on whether the gasoline it bought from other refiners contained additives or not.[81] Clearly, Texaco had the right to put

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[81] There is some controversy over whether Texaco added "Petrox" to gasoline it bought from other refiners but marketed under the Texaco brand. *Compare* N.T. 704–706; 1572–75 with N.T. 226–48, 443–36. Although I find that the weight of the credible evidence establishes the fact that Texaco did add Petrox to the gasoline it so purchased, this finding is irrelevant to my conclusion on the validity of Sweeney's defense; the law gives Texaco, as the owner of a trademark, the right to decide what products to market under its trademark irrespective of whether it takes any action beyond selecting them. *Menendez v. Holtz*, 128 U.S. 514, 9 S.Ct. 143, 32 L.Ed. 526 (1888).

its trademark on whatever gasoline it deemed suitable. The crucial point, which apparently escapes Sweeney, is that just because Texaco, the owner of the trademark, could decide what gasoline to market under that trademark does not mean that Sweeney, who had only the right to sell gasoline so marked, had a like right to decide which gasoline to call Texaco. Any perceived unfairness in this disparity evaporates with the realization that it is precisely what the trademark laws are supposed to accomplish. Indeed, if anyone could decide what goods to market under a given trademark, the value of that trademark and therefore its identity as a trademark would disappear. This is truly a case where what is good for the goose is not good for the gander —that Texaco could and did lawfully decide what gasoline to sell under its trademark does not change the illegality of the same actions, when done by Sweeney. It is Texaco's trademark, not Sweeney's.

Other courts have agreed with this proposition. Thus, in *Blue Bell Co. v. Frontier Refining Co.*, 213 F.2d 354 (10th Cir. 1954), an oil company (Frontier) had brought an action against a wholesaler and retailer (Blue Bell) to enjoin and recover damages for the wholesaler's alleged trademark infringement. Interestingly, the wholesaler asserted counterclaims against Frontier claiming that Frontier's actions violated §§ 1 and 2 of the Sherman Act. The district court entered judgment on the jury's verdict for Frontier and the court of appeals affirmed. By so doing it implicitly rejected the argument which Sweeney now makes in this case: in *Blue Bell* the wholesaler picked up gasoline at terminals of other refiners, with whom Frontier had an exchange agreement. 213 F.2d at 356-57. Nevertheless, the court found Frontier's trademark valid[82] and Blue Bell's practice of picking up gasoline from refiners other than those designated by Frontier's exchange agreement and selling that gasoline under the Frontier trademark to constitute an infringement of that trademark.

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[82] Sweeney does not challenge the validity of Texaco's trademark. *See* Defendant's Exhibits 44–49.

In *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976), the court affirmed this proposition by reversing the district court's entry of summary judgment on Shell's claims under the Lanham Act. Although the evidence established that Shell obtained much of the gasoline it sold in the area from another refiner, the court noted that the Shell trademark represented that "the gasoline was Shell gasoline and thus either made by or for Shell," 524 F.2d at 1057. This gave Shell the right to insist that only gasoline to which *it* affixed the Shell trademark be sold under that trademark. *Id.*

There can be no doubt that both the precepts followed by courts since 1888 as well as sound public policy decree that Texaco's purchase of gasoline from other refiners does not constitute a breach of Sweeney's distributor agreement and does not excuse Sweeney's own violation of that agreement and the various state and federal statutes governing the use of trademarks. Texaco agreed to sell Texaco branded gasoline to Sweeney. Knowing the value of selling a trademarked product Sweeney converted its stations from unbranded to Texaco branded stations. (N.T. 120-146). (*See e.g.* Plaintiffs' Exhibit 7). This enabled those stations to sell Texaco gasoline at prices higher than those charged for unbranded gasoline. (N.T. 127-133). As Mr. Sweeney testified, the ability to use the Texaco trademark was "the heart of [Sweeney's] marketing program." (N.T. 225). Sweeney reaped the benefits of using the Texaco trademark; it cannot now abdicate its responsibilities.

B. RELIEF

Despite Sweeney's arguments to the contrary, Texaco is entitled to both injunctive and declaratory relief.

1. DECLARATORY RELIEF—28 U.S.C. § 2201

[45] Sweeney argues that Texaco has failed to show the existence of a case or controversy between the parties. That claim is preposterous. Sweeney and Texaco have been at logger-

heads for close to ten years now. Indeed, the only possible justification for Sweeney's argument is that it has been in an adversary position with Texaco for so long that it has forgotten that such is not supposed to be the normal state of affairs. Nevertheless, Sweeney argues that there is no evidence of recent violations. Even if this were correct, and it is not, (N.T. 1594-96), Texaco would still be entitled to a declaratory judgment that Sweeney commingled Texaco gasoline and committed the violations charged in Texaco's first and second counterclaims.

As Texaco has shown, under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. at § 102(c)(1), as well as some of the New Jersey statutes pursuant to which Texaco is asserting its counterclaims, if it receives such a judgment, Texaco may be able to take some action to enforce its termination rights under the 1972 agreement pursuant to which it now supplies Sweeney. (Plaintiffs' Exhibit 68A). (*See* note 11 and accompanying text, *supra*). Therefore, far from delaying the impact of this court's ruling or making it moot, as Sweeney claims, (*see* Plaintiff's Memorandum in Opposition to Texaco's Second and Third (sic) Counterclaims, at 9-10) the federal legislation makes the impact of this court's ruling immediate and definitive. This suffices to establish the existence of a present case or controversy. *Golden v. Zwickler,* 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969); *Evers v. Dwyer,* 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958); *Altvater v. Freeman,* 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450 (1943); *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Having shown that it has a present controversy with Sweeney over whether Sweeney's conduct violated the various statutes cited in its first and second counterclaims as well as the common law of unfair competition and Sweeney's distributor agreement, and having shown that Sweeney's conduct did indeed violate those statutes, common law, and its distributor agreement, Texaco has shown that it is entitled to a declaratory judgment to that effect. A judgment will be entered accordingly.

2. INJUNCTIVE RELIEF

[46] Sweeney claims that this court should not enjoin it from commingling non-Texaco gasoline with Texaco gasoline, selling non-Texaco diesel fuel as Texaco diesel fuel, and delivering non-Tevaco gasoline in Texaco branded trucks because there is no evidence that Sweeney will do these things in the future and therefore there is no evidence of present harm or threat of harm to Texaco from Sweeney's conduct. By Sweeney's own admission, the record contains evidence of violations up through 1976, (*see* Plaintiff's Memorandum in Opposition to Texaco's Second and Third (sic) Counterclaims, at 3). This conduct has persisted since at least 1971. Even the filing of this lawsuit in 1974 failed to change Sweeney's practices. To hold that there is no threat of recurrence of a practice which seems to be firmly embedded in the Sweeney organization and which even the threat of termination by Texaco in 1971 did not curb is to taunt reality.

[47] Moreover, failure to enter an injunction will harm Texaco more than its entry would harm Sweeney. If Sweeney has indeed ceased to commingle Texaco with non-Texaco gasoline, sell non-Texaco diesel fuel as Texaco diesel fuel, and deliver non-Texaco gasoline in Texaco marked trucks, entry of an order enjoining it from doing those things will not harm Sweeney.[83] By contrast, if Sweeney continues to engage in those practices, failure to enter such an order would greatly harm Texaco.[84] *See Franklin Mint, Inc. v. Franklin Mint Ltd.*, 331 F.Supp. 827 (E.D.Pa.1971). Under these circumstances I have little difficulty in concluding that Texaco has shown that it will suffer irreparable harm unless this court enjoins Sweeney from engaging in the practices complained of.

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[83] Given the issuance of the declaratory judgment which Texaco seeks, the entry of an injunction will make little difference in Sweeney's position before the applicable regulatory agencies. (*See* Part VIII B.1, *supra*).

[84] Absent an injunction Texaco would have to start from scratch to bring an entirely different lawsuit to establish its rights, whereas it would only need to file an order to show cause why Sweeney should not be held in contempt if this court has entered an injunction.

On Injunctive Relief

On August 31, 1979, this court filed a memorandum explaining its reasons for granting the motion of defendant, Texaco, Inc. (Texaco), for a directed verdict and deciding the merits of Texaco's first and second counterclaims against plaintiff Edward J. Sweeney & Sons, Inc. (Sweeney). *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.* 478 F.Supp. 243 (E.D.Pa. 1979) (hereinafter cited as *Sweeney I*). Since that memorandum sets out the facts and history of this litigation in great detail, I will not repeat them here. Rather, as I stated in footnote 17 thereof, I will limit myself to deciding whether the request of plaintiffs Sweeney, Mission Gas Oil Products, Inc. (Mission), and Petroleum Products Company (Petroleum) for injunctive relief pursuant to § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and § 16 of the Clayton Act, 15 U.S.C. § 26, should be granted.[1] I hold that it should not.

I. *SWEENEY'S CLAIM FOR INJUNCTIVE RELIEF*

[48] Sweeney takes the position that since this court's grant of Texaco's motion for a directed verdict on Sweeney's Robinson-Patman claims proceeded from its conclusion that Sweeney had failed to make the requisite showing of injury under *Enterprise Industries Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957), the court's ruling did not foreclose the grant of injunctive relief. Sweeney is correct. However, whereas in deciding Texaco's motion for a directed verdict the court had to examine the evidence favorable to the plaintiff and could find for the defendant only if it concluded that no reasonable jury could do otherwise, on the issue now before the court a different standard

[1] Plaintiffs have stated that this court's grant of Texaco's motion for a directed verdict on their claims for damages under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, also disposes of their claims for injunctive relief thereunder. *See* Plaintiffs' Memorandum in Support of Their Request for Injunctive Relief, at 1–2. Since plaintiffs are correct in so stating I will simply enter an order denying those claims. At this juncture I need only decide plaintiffs' claims for injunctive relief under § 2 of the Robinson-Patman Act. These claims are, however, based on the same facts as plaintiffs' claims for damages under that section.

applies. I now sit as a trier of fact and can grant Sweeney's request for an injunction only if I find that it has proved that Texaco violated the Robinson-Patman Act. I find that Sweeney has failed to so prove.

[49] The agreements which Texaco enters into with its distributors in this area all provide that Texaco may either deliver the product to the distributor at its own expense or allow the distributor to pick up the product at whatever point Texaco designates, giving the distributor an allowance for assuming the cost of hauling the product to its bulk plant. (*See* Plaintiffs' Exhibits, 4, 5). In all cases this allowance is based on the lowest common carrier rate between the designated Texaco pick up point and the distributor's bulk plant. (*See* Plaintiffs' Exhibit 5). Texaco chooses the pick up point for each distributor based on what is more economically advantageous to Texaco. (N.T. 1289-97). That is rational market behavior because that is precisely what Texaco would do if it delivered the product in its own trucks or contracted to have the product delivered to the distributor's bulk plant. In Sweeney's case Texaco determined that it would be cheaper for Texaco to have Sweeney pick up at Macungie rather than at Westville. (*See* Plaintiffs' Exhibit 39; Defendant's Exhibits 437-438; N.T. 1287-1298, 1365-1378; *Sweeney I* at 256). Texaco therefore changed Sweeney's pick up point and, necessarily, its hauling allowance.[2] Sweeney's competitors had their bulk plants at different locations and Texaco did not change their hauling allowances. These actions may have hurt Sweeney, but they did not violate the Robinson-Patman Act.[3] *See Morton v. National Dairy Products Corp.*, 414 F.2d

[2] When Sweeney objected to this change Texaco agreed to a compromise whereby Sweeney would receive the Macungie to Pottstown rate but be allowed to pick up at either Macungie or Westville. (*See Sweeney I* at 253–254). Whatever Robinson-Patman problems this latter practice may create between Texaco and Sweeney's competitors are not before me at this time and I express no opinion on their resolution.

[3] This ruling assumes, as did my previous ruling, that the hauling allowance is not a functional discount and that the requisite sales in interstate commerce have occurred. (*See Sweeney I* at footnotes 61, 62). Since Texaco has taken the position that it did not violate the Robinson-Patman Act, it has not argued the existence of a cost justification defense.

403 (3d Cir. 1969), *cert. denied,* 396 U.S. 1006, 90 S.Ct. 560, 24 L.Ed.2d 498 (1970).

Texaco is doing precisely what the Robinson-Patman Act says it should do: it is treating all its distributors equally. That such treatment yields a more advantageous result for one distributor than for another due to factors, such as the location of bulk plants and service stations, solely within each distributor's control cannot convert the practice into a violation of the Robinson-Patman Act. As the Supreme Court has often reminded us, "antitrust laws . . were enacted for 'the protection of *competition,* not *competitors.*' " *Brunswick v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), *quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). *See also, American Oil Co. v. FTC,* 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954, 84 S.Ct. 1631, 12 L.Ed.2d 498 (1964).

Indeed, if Texaco adopted the system which Sweeney suggests—giving Sweeney the Westville to Pottstown hauling allowance even though it is cheaper and therefore more economically sound for Texaco to give Sweeney the Macungie to Pottstown hauling allowance—Texaco would likely be subject to claims of price discrimination by Sweeney's competitors.[4] Texaco would then have made Sweeney the preferred purchaser by giving it a price more favorable than the price given to Sweeney's competitors. I will not permit such an anomalous and unfair result.[5]

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[4] These claims would be particularly strong since Sweeney's competitors could argue that Texaco was acting against its own economic interests. *Venzie Corp. v. United States Mineral Products Co., Inc.,* 521 F.2d 1309, 1315–16 (3d Cir. 1975).

[5] Sweeney's request overlooks the import of the extensive federal regulation of the oil industry. I cannot purport to divine the impact which any injunction such as the one Sweeney seeks would have on the regulations applicable to gasoline pricing. The federal regulation of the industry will itself make it difficult for Texaco to engage in discriminatory pricing. Without an allegation that Sweeney's hauling allowance violates any of the applicable regulations, I am reluctant to interfere with a congressional regulatory scheme. Of course, if I had found that Texaco had violated the Robinson-Patman Act or if Sweeney had alleged some violation of

Moreover, if Texaco adopted a uniform hauling allowance and gave every distributor the same dollar amount regardless of the location of their bulk plant, as Sweeney also seems to suggest, Texaco would be subject to claims of price discrimination by some distributors. Under such a system the hauling allowance would bear no relationship to the distance between the distributor's bulk plant and its pick up point. The distributors whose bulk plants are located close to the pick up point would thus receive an advantage over those whose plants are located far from the pick up point. That situation would present the same kind of unfairness condemned by the Supreme Court in the "phantom freight" cases. *See FTC v. Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948); *Areeda,* Antitrust Analysis at 307-308, *Rowe,* Price Discrimination under the Robinson-Patman Act, at 87-91.

Texaco could, of course, continue to use its delivered pricing system but insist on delivering the product itself. *Cf. FTC v. A. E. Staley Manufacturing Co.,* 324 U.S. 746, 757, 65 S.Ct. 971, 89 L.Ed. 1338 (1945) (purchasers who have the "natural advantage of proximity" to the seller's plant are entitled to certain price advantages over purchasers at a distance). If Texaco adopted this practice it would deliver the product to the distributor's bulk plant, as provided by the distributor agreement (*See* Plaintiffs' Exhibit 4), and include the cost of delivery in the price charged. Such an arrangement would be disadvantageous to Sweeney,[6] however, and in the absence of a Robinson-Patman Act violation this court can see no reason for requiring Texaco to deprive distributors of the option of either picking up

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these regulations, I would not hesitate to delve into them to ascertain the limits of an appropriate injunction. Absent any finding or allegation to that effect, however, I will not undertake such an expedition.

[6] Under this system Texaco would use its own trucks or pay a common carrier to transport the product from Macungie to Sweeney's bulk plant in Pottstown. Sweeney would then have to bear the cost of transporting the product from Pottstown to its stations in New Jersey. It would thus be in a worse position than it is now since Texaco now gives it the option of picking up at Westville.

the product themselves or having Texaco deliver it to their bulk plants. As long as these two methods are administered so that they result in equivalent cost to Texaco this court cannot find that Texaco has violated the Robinson-Patman Act by merely giving its distributors the option of which to adopt.[7]

II. *MISSION AND PETROLEUM'S CLAIMS FOR INJUNCTIVE RELIEF*

Although by order dated June 1, 1979, this court denied Mission and Petroleum's claims for damages under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), it must now decide whether these plaintiffs are entitled to receive injunctive relief under § 2(a) of the Robinson-Patman Act and § 16 of the Clayton Act.[8]

[50] Mission and Petroleum purchased Texaco gasoline from Sweeney on a cost-plus basis (Defendant's Exhibits 159, 160; N.T. 536-538). Therefore they claim to have borne the cost of any discrimination experienced by Sweeney. Whatever the accuracy of this allegation, it fails to justify the granting of an injunction on these plaintiffs' behalf. By plaintiffs' own admission, they purchased the product in question from Sweeney, not from Texaco. Thus, like the plaintiff in *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956), plaintiffs Mission and Petroleum are not purchasers within the meaning of the Robinson-Patman Act. *See Kelly v. General Motors Corp.*, 425 F.Supp. 13, 20 n.6 (E.D. Pa. 1976). They are not entitled to any relief whatsoever in this lawsuit.

---

[7] As *Staley* makes clear, Texaco could lawfully adopt a uniform delivered price system. If by allowing its distributors to pick up it is achieving the same result, and I find that it is, it cannot be violating the Robinson-Patman Act. The mere use of an alternative means of reaching the same end cannot turn a legal system into an illegal one.

[8] Mission and Petroleum agree that this is the only issue remaining for the court's decision in light of the grant of Texaco's motion for a directed verdict. *See* note 1 and accompanying text, *supra*.

In any event, it follows inexorably from my ruling on Sweeney's entitlement to injunctive relief, Part I, *supra,* that Mission and Petroleum's requests for similar relief must be denied. Mission and Petroleum's claims derive from Sweeney's; their claims can only succeed if Sweeney's claim succeeds. Since Texaco did not violate the Robinson-Patman Act with respect to Sweeney, as I have held, it could not have violated the Robinson-Patman Act with respect to Mission and Petroleum. Thus, even if they could maintain their claims despite *Klein,* Mission and Petroleum's request for injunctive relief would have to be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2468

EDWARD J. SWEENEY & SONS, INC. and MISSION GAS OIL COMPANY, INC. and PETROLEUM PRODUCTS CO.,

Appellants

vs.

TEXACO, INC.

(D. C. Civil No. 74-3299)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges,* and RAMBO, *District Judge.*

The petition for rehearing filed by

Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Gibbons and Sloviter would grant the petition for rehearing.

By the Court,

Dated: November 28, 1980 Judge

* Honorable Sylvia H. Rambo, of the United States District Court for the Middle District of Pennsylvania, sitting by designation.

Judges Adams, Rosenn and Weis did not participate in the consideration of this matter.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. SWEENEY & SONS, INC., et al.	:	
v.	:	CIVIL ACTION NO 74-3299
TEXACO, INC.	:	

AND NOW, this 1st day of June, 1979, IT IS ORDERED that defendant's motion for partial summary judgment is GRANTED in part and DENIED in part as follows:

1. The defendant's motion for partial summary judgment is granted as to the claims of plaintiff Mission Gas Oil Company for damages and the claims of plaintiff Petroleum Products Company for damages. Judgment shall be entered for defendant Texaco dismissing all of plaintiff Mission Gas Oil Company's claims for damages and all of plaintiff Petroleum Products Company's claims for damages in this action.

2. The defendant's motion for partial summary judgment is denied as to the claims of plaintiffs Mission Gas Oil Company and Petroleum Products Company for injunctive relief.

3. Texaco shall not assert a pass-on defense (as described in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 329 U.S. 481 (1968)) against plaintiff Edward J. Sweeney & Sons, Inc.'s Sherman Act claims for damages at trial.

4. The judgment entered pursuant to paragraph one of this Order shall not constitute a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This court makes no finding that there is "no just reason for delay," and indeed finds that making this a final judgment would result in unnecessary delay and would not be in the best interest of justice.

6-1-79 entered and copies to:

Mitchell A. Kramer, Esq.
Jane D. Elliott, Esq.
David A. Luttinger, Esq.

BY THE COURT:

Edward N. Cahn, J.

APPENDIX E

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000.00 or imprisoned not more than one year, or both.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

No. 80-1458

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD J. SWEENEY & SONS, INC.,
MISSION GAS OIL COMPANY, INC.

and

PETROLEUM PRODUCTS CO.,

Petitioners,

—v.—

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was sufficient evidence of concerted action introduced at trial to permit a Section 1 Sherman Act conspiracy claim to be submitted to the jury?

2. Does a manufacturer violate Section 2(a) of the Robinson-Patman Act by uniformly applying a hauling allowance program based on actual cost savings to the manufacturer as a result of services performed by distributors?

3. Is a plaintiff entitled to Robinson-Patman Act damages merely from alleged proof of a discrimination in price, where there was no proof that petitioners were damaged by the alleged discrimination or proof that petitioners absorbed the amount of the alleged discrimination?

4. Are indirect purchasers who did not buy on a fixed-quantity cost-plus basis from the direct purchaser barred from antitrust recovery under *Illinois Brick*?

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Rules

Supreme Court Rule 19 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1458

EDWARD J. SWEENEY & SONS, INC.,
MISSION GAS OIL COMPANY, INC.

and

PETROLEUM PRODUCTS CO.,

Petitioners,

—v.—

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

Respondent Texaco Inc. ("Texaco") respectfully submits that the instant Petition utterly fails to present a single "special and important reason" warranting the issuance, in the exercise of this Court's sound judicial discretion, of a writ of certiorari. *See* Sup. Ct. Rule 19. On the contrary, the principal question presented—whether sufficient circumstantial evidence was introduced at trial to permit a Sherman Act conspiracy claim to go to the jury—has absolutely no significance beyond this litigation. Petitioners themselves admit that the resolution of that question depends solely upon the case's "own particular facts" (Petition at 13). Indeed, petitioners' central argument is

that "neither the district court nor the appellate majority considered all the evidence presented by Sweeney." (*Id.*). Whether the district court and the Third Circuit properly assessed the probative weight of petitioners' trial evidence—and we submit they unerringly did—is hardly a matter which justifies the sparing invocation of this Court's extraordinary certiorari jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was sufficient evidence of concerted action introduced at trial to permit a Section 1 Sherman Act conspiracy claim to be submitted to the jury?

2. Does a manufacturer violate Section 2(a) of the Robinson-Patman Act by uniformly applying a hauling allowance program based on actual cost savings to the manufacturer as a result of services performed by distributors?

3. Is a plaintiff entitled to Robinson-Patman Act damages merely from alleged proof of a discrimination in price, where there was no proof that petitioners were damaged by the alleged discrimination or proof that petitioners absorbed the amount of the alleged discrimination?

4. Are indirect purchasers who did not buy on a fixed-quantity cost-plus basis from the direct purchaser barred from antitrust recovery under *Illinois Brick*?

Statement of the Case

We refer to the exhaustive opinions below for a statement of the relevant facts. (App. A, at pp. 33-36; App. B, at pp. 90-95). However, because petitioners' factual statement is (1) totally silent about the rationale for Texaco's hauling allowance program, and (2) misleading with respect to the precise nature of petitioners' antitrust conspiracy claim, some further elaboration is required.

The raison d'etre for Texaco's hauling allowance program was the cost savings to Texaco generated by having a distributor pick up at a Texaco terminal rather than having Texaco itself deliver to the distributor. Texaco's agreements with its distributors (like Sweeney) required Texaco to deliver fuel at Texaco's sole cost to the distributor's bulk plant from a point of supply designated by Texaco—which cost, quite naturally, Texaco sought to minimize by choosing to deliver the product by the least expensive route.

In lieu of Texaco performing this hauling function, Texaco permitted distributors to pick up product themselves when the distributors requested to do so. In such circumstances, since the distributor was relieving Texaco of the delivery obligation set forth in Texaco's distributorship agreement and the related delivery cost which Texaco would otherwise incur, Texaco granted the distributor a hauling allowance equal to the lowest amount it would cost Texaco to deliver the fuel from Texaco's designated supply point to the distributor's bulk plant by common carrier, contract carrier, or Texaco company truck.

Sweeney's bulk plant was located in Pottstown, Pennsylvania, and, in 1958, Texaco designated its terminal in Westville, New Jersey as Sweeney's supply point. As early as 1966, however, Texaco considered changing Sweeney's designated supply point to Texaco's Macungie, Pennsylvania terminal because the cost of supplying Pottstown had changed and Texaco found that shifting Sweeney's point of supply from Westville to Macungie would save Texaco $2,158 annually on the basis of Sweeney's annual purchases of approximately 3.8 million gallons.[1] Nevertheless, when Sweeney objected (claim-

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1 Texaco had a refinery at Eagle Point (Westville), New Jersey and a terminal next to the refinery. Texaco also had a terminal at Macungie, Pennsylvania. Product was brought by Texaco to the Macungie terminal from the Eagle Point refinery by two interstate pipelines. The economics of delivering to Pottstown, Pennsylvania boils down to the following question: is it less expensive to deliver from Westville to Pottstown (50 miles) by truck (regulated by the Interstate Commerce Commission) than it is to send the product by pipeline from Eagle Point to Macungie (pipeline rates are also I.C.C. regulated) and deliver

ing that it had customers located around the Westville area), Texaco postponed its decision.

By 1970, however, the economics of supplying Sweeney out of Westville had, in the Third Circuit's words, "changed dramatically." (App. A, at p. 35). Instead of $2,158, the undisputed evidence showed that Texaco could effectuate a $58,000 annual cost savings by supplying Sweeney from Macungie instead of Westville.[2] As a result, in December 1970, Texaco informed Sweeney that it was changing Sweeney's supply point to Macungie, as was Texaco's right under the March 1963 hauling agreement between Sweeney and Texaco. When Sweeney refused to go along with the change, Texaco gave Sweeney a sixty-day termination notice, effective February 28, 1971. As a result of ensuing negotiations, however, Sweeney's distributorship was not terminated and the parties entered into a revised hauling agreement on March 1, 1971. Under the new arrangement, Westville continued as Sweeney's designated supply point until May 31, 1971. Thereafter, Sweeney was to pick up product at Macungie and receive a hauling allowance based upon a Macungie supply point—the most economic point of supply for Pottstown. Since the cost of hauling from Macungie to Pottstown was less than the cost of hauling from Westville to Pottstown, Sweeney's hauling allowance was reduced. As a result of its negotiations with Texaco, however, Sweeney received a concession: after May 31, 1971, Sweeney would not be turned away at the Westville gates; Sweeney could continue to pick up at Westville if it chose to do so. The hauling allowance for all purchases would be based on the Macungie to Pottstown trip, however.

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from Macungie to Pottstown (20 miles) by truck (not Federally regulated)? That equation varies with changes in intrastate and interstate trucking rates and I.C.C. pipeline rates, and the volume of product involved.

2 *See* footnote 1 *supra*. That change resulted in part from Sweeney's sales increase from under 3.8 million gallons to 17.7 million gallons in 1970.

The only Section 1 Sherman Act claim for which petitioners sought damages below was that Texaco's reduction in Sweeney's hauling allowance was the product of a conspiracy between Texaco and certain dealers who complained about Sweeney's competitive practices. Although Texaco subsequently sent Sweeney a termination notice in December 1971, Texaco did not cease delivering product to Sweeney and petitioners "withdrew" any antitrust damage claim at trial based on that later event. (App. A, at p. 37 n.1). Thus, as the Third Circuit pointed out:

> "Only the claim of damages based on the change in [Sweeney's] hauling allowance was before the [district] court on the motion for directed verdict, and therefore only that claim is before us now." (*Id.*)[3]

Accordingly, in order to avoid a directed verdict on their Section 1 claim, petitioners were obligated at trial to introduce sufficient evidence that on or before December 1970 there was a conspiracy between Texaco and its dealers. However, all that

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3 Although it is of no moment on the instant Petition, the Court should be aware of the reasons for the December *1971* termination notice. In the summer and fall of 1971, Texaco learned that Sweeney was selling non-Texaco product under the Texaco trademark. After confirming pervasive trademark violations by Sweeney, on December 17, 1971, Mr. Doherty, Texaco's General Manager of the Philadelphia region, recommended Sweeney's termination; a termination notice was sent on December 27, 1971. Following negotiations, Texaco agreed to continue to supply Sweeney while Sweeney looked for an alternate supplier, subject to 10 days' notice of termination by Texaco. That arrangement, which was breached by Sweeney when he filed this lawsuit, had been "institutionalized" for a time by Federal energy regulations.

At trial below, Texaco counterclaimed for a declaratory judgment that Sweeney had breached its contract with Texaco, infringed Texaco's trademark, violated several state statutes and committed common law unfair competition by selling non-Texaco product under the Texaco trademark. Texaco also sought an injunction against future violations. Sweeney conceded the trademark violations at trial and the district court granted Texaco declaratory and injunctive relief. (App. B, at pp. 144-54). The Third Circuit unanimously affirmed. (App. A, at p. 61). Petitioners have not challenged those decisions here.

petitioners proffered were sporadic dealer complaints about Sweeney's and others' marketing practices over a thirteen-year period (1966-1979) plus some bits and snatches of nonprobative testimony which both the district court and the Third Circuit found would have required the jury to engage in unwarranted speculation to find concerted action between Texaco and its dealers. On this record, it is respectfully submitted, a directed verdict for Texaco was eminently correct and, in all events, presents no basis for the exercise of this Court's certiorari power.

REASONS FOR DENYING THE WRIT

I. The Courts Below Correctly Decided That There Was Insufficient Circumstantial Evidence of a Section 1 Conspiracy to Permit That Claim to Go to the Jury; and, in All Events, That Ruling Does Not Present a "Special and Important" Issue for Certiorari

Petitioners do *not* contest the legal proposition at the heart of this case—that complaints from dealers about a competitor, followed at some point by the manufacturer's termination of that competitor, are insufficient standing alone to support an inference of conspiracy between the manufacturer and the complaining dealers; a dealer does not earn a contract in perpetuity by the mere complaint of a competitor. Nor could petitioners dispute this, since it is a fundamental antitrust precept. *See, e.g., Westinghouse Electric Corp.* v. *CX Processing Laboratories, Inc.*, 523 F.2d 668, 674-75 (9th Cir. 1975); *Carr Electronics Corp.* v. *Sony Corp.*, 472 F. Supp. 9, 12 (N.D. Cal. 1979); *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D.N.Y. 1968). As the Second Circuit recently reaffirmed (subsequent to the Court of Appeals' decision challenged in this Petition):

> "[E]ven if Sears' actions were to be viewed as a complaint by one Whirlpool customer about the selling practices of another, *such a complaint would not indicate illegal con-*

> *certed action, since it is merely normal marketplace behavior for such complaints to be made."*[4]

The issue, therefore, on petitioners' Section 1 claim is whether there was sufficient probative evidence of concerted action at trial—beyond mere complaints plus termination—to warrant submitting that claim to the jury. And the resolution of that issue, as petitioners themselves concede, depends solely on the record of this particular case and has no bearing whatsoever on the outcome of any other case with different facts and a different record. Thus, petitioners state that the sufficiency of their conspiracy evidence cannot be assessed by "making a paradigmatic comparison to the particular facts" of other Section 1 cases, but instead must be determined "based upon [this case's] own particular facts." (Petition at 13). For that very reason, this is indisputably not a matter for certiorari. As Justice Holmes declared in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925): "We do not grant a certiorari to review evidence and discuss specific facts." *See also* Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S. Ct. v, vi:

> "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[5]

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4 *Oreck Corp.* v. *Whirlpool Corp.,* 1980-81 Trade Cas. ¶ 63,619 at p. 77,283 (2d Cir. 1980) (emphasis added).

5 For the same reason that this case has no immediate importance beyond the particular facts and parties involved, it does not present a "conflict" with the other Section 1 decisions cited by petitioners. (Petition at 10-11, 13-17). The difference in result in those cases turned not upon the application of different legal principles to similar facts, but instead upon the application of the same legal principles to different facts; in other words, it was the quantum and quality of the evidence in those cases which was outcome-determinative. Thus, for example, in *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.,* 633 F.2d 477 (7th Cir. 1980), plaintiff proved not only complaints plus termination, but also that defendant's sales representative actually *agreed* with complaining dealers to eliminate plaintiff's discounting "in response to

In a Procrustean effort to force this case into a certiorari mold, petitioners would have this Court believe that the Third Circuit held that "circumstantial evidence alone is insufficient to prove a § 1 Sherman Act conspiracy between a distributor and a supplier." (Petition at 16). That, indeed, would have been a startling ruling, which perhaps might be worthy of review by this Court. The Court of Appeals, however, held no such thing. Indeed, Judge Aldisert was at pains to acknowledge the importance of circumstantial evidence in a conspiracy case:

> "Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence: 'The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.' [Citation omitted.]" (App. A, at p. 39).[6]

What petitioners are really complaining about is the Third Circuit's application of the well-settled concomitant to the circumstantial evidence rule; that, in Judge Aldisert's words, "appellant had the burden of adducing sufficient evidence

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complaints." (*Id.* at 480). Nothing even approaching that kind of incriminating evidence was introduced by petitioners below. Similarly, in *Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 1980-81 Trade Cas. ¶ 63,148 (7th Cir. 1980), the record revealed that on the very same day a complaining dealer implored defendant to stop dealing with a price-cutting competitor, defendant directed its salesmen to accept no further orders from that customer. (Appellant's Br. at 8). In stark contrast to the irresistible causal inference there, the evidence below demonstrated that the dealer complaints about Sweeney were not temporally connected to Texaco's change in its agreements with Sweeney; and there was no evidence showing the frequency of the complaints or whether the frequency changed at any time. (*See* App. A, at p. 45).

In short, petitioners cannot transform their failure of proof into a conflict among the Circuits.

6 Similarly, the district court rejected the notion that petitioners were obligated to introduce "direct" evidence of a conspiracy. (App. B, at p. 101 n.25).

from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation." (App. A, at p. 39). As this Court put it in *Galloway* v. *United States,* 319 U.S. 372, 395 (1943):

> "Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Accord, e.g., Venzie Corp. v. *United States Mineral Products Co.,* 521 F.2d 1309, 1312 (3d Cir. 1975) (affirming directed verdict dismissing § 1 conspiracy claim); *Michelman* v. *Clark-Schwebel Fiber Glass Corp.,* 534 F.2d 1036, 1042 (2d Cir.), *cert. denied,* 429 U.S. 885 (1976) (reversing failure to grant judgment *NOV* dismissing § 1 conspiracy claim).

Applying this principle to the record below, the Third Circuit concluded that petitioners' conspiracy "evidence" failed to pass muster. As Judge Aldisert summed it up:

> "The basic record facts were that some of Sweeney's competitors complained that Sweeney's stations undersold them by one to three cents per gallon, that Rodden did not know but 'guessed' Texaco acted to terminate Sweeney because of these complaints, that Murray surmised Texaco was evaluating Sweeney's ability to get long hauling allowances for short deliveries, and that certain consequences of Sweeney's marketing strategy not directly related to Sweeney's competitive position figured into Doherty's decision to terminate Sweeney. Faced with this scanty record, the district court properly removed the issue of concerted action from the jury. It determined that insufficient narrative or historical evidence had been submitted to permit the conclusion that Texaco's decision was a reaction to the specific complaints received. Moreover, the record was devoid of proof of concerted action among Sweeney's competitors and Texaco. The court concluded

> that the jury could not infer this ultimate fact from the basic facts in evidence without engaging in pure *post hoc* guesswork. We will not fault the court for these determinations." (App. A, at pp. 49-50).

Not only does that holding fail to present any question which has "immediate importance far beyond the particular facts and parties involved," but it is eminently correct in its own right.

Petitioners' principal evidentiary argument is that the Court of Appeals "usurped the jury's function" in concluding that the testimony of Daniel A. Doherty, the manager of Texaco's Philadelphia region, was insufficient to support a reasonable inference of conspiracy between Texaco and its complaining dealers. (Petition at 8-9). It is petitioners who are in error, however, not the Third Circuit.

To begin with, contrary to petitioners' implication (Petition at 9), Mr. Doherty was *not* the person who "made the decision" to notice Sweeney's termination in *December 1970*—the only "termination" for which petitioners claimed damages below. Mr. Doherty did not even take over responsibility for the Philadelphia region (including Sweeney) until June 1971. Moreover, the testimony which petitioners rely upon related solely to Texaco's *December 1971* notice to terminate Sweeney—a termination which did not disturb the continuation of Sweeney's supply and for which petitioners do not claim antitrust damages. Accordingly, even if Mr. Doherty's testimony were susceptible to a reasonable inference of concerted action, it would not help petitioners one iota on the only relevant conspiracy question before the Court—whether Texaco's December 1970 termination notice and the resultant reduction in Sweeney's hauling allowance were the product of concerted action.[7]

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7 This is equally true with respect to petitioners' assertion that Texaco "investigated Sweeney's pricing practices in the market prior to termination." (Petition at 11). What petitioners fail to mention is that the alleged investigation took place *after* the reduction in Sweeney's hauling allowance and "prior to" the December 1971 "termination."

Moreover, even had Mr. Doherty's testimony related to the earlier December 1970 termination notice, it was not probative of conspiracy. While Mr. Doherty testified that Sweeney's "marketing strategy" played a small part in Texaco's decision to notice Sweeney's termination in December 1971, a reading of his testimony in context makes it emphatically clear that his concern was for the "consequences" of Sweeney's "marketing strategy": that is, "Sweeney's failure to meet housekeeping, service, or service capability standards—practices contrary to 'the prestige service that had been the hallmark and objective of Texaco retail marketing'—and resulting *customer* complaints." (App. A, at p. 43) (emphasis added). On this basis, the Third Circuit quite properly ruled that it would be "impermissible" for a jury to infer from Mr. Doherty's testimony that Texaco decided to terminate Sweeney in response to *competitors'* complaints about his low prices. (*Id.*)

Equally significant, petitioners' strained reading of Mr. Doherty's testimony was flatly contrary to every reasonable inference which the record did support. First, the evidence showed that competitors' complaints about Sweeney were not limited to the period leading up to the change in Sweeney's hauling allowance; and there was no indication of the frequency of the complaints or that they intensified during 1970-71. As the Third Circuit observed, "[t]hese facts militate strongly against a causal relation between the complaints and Texaco's actions." (App. A, at p. 45). What in fact happened by December 1970 was that Texaco's loss attributable to supplying Sweeney from Westville had increased dramatically from $2,158 to $58,000 annually. Thus, by changing Sweeney's supply point (and its hauling allowance as a result), Texaco was acting in its own economic self-interest, thus "negat[ing] an inference of concerted action. . . ." (*Id.*) Finally, it is noteworthy that the reduction in Sweeney's hauling allowance was less than one cent per gallon. (*Id.* at n.4). As Judge Aldisert remarked concerning this fact:

> "It is difficult to accept appellants' assertion that an action affecting Sweeney's cost by a fraction of a cent was

> taken in response to complaints citing price differentials of several cents, even taking into account the millions of gallons sold." (*Id.* at 45-46).

The long and the short of it is that "aside from the evidence of complaints made to Texaco by other retailers, Sweeney introduced no evidence of a conspiracy between Texaco and its retailers or wholesalers." (App. A, at p. 47). It is not the role of certiorari to save petitioners from their own failure of proof. The Petition should be denied forthwith.

II. The Remaining Robinson-Patman and *Illinois Brick* Issues Are Frivolous

A. Petitioners' Robinson-Patman Claims Were Correctly Dismissed

The Court of Appeals unanimously held on the undisputed facts that Texaco's uniform application of its hauling allowance formula did not discriminate against petitioners in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). On that basis, the Third Circuit affirmed the dismissal of petitioners' Robinson-Patman Act damage and injunctive claims. That ruling—which followed ineluctably from the Second Circuit's holding in *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977)—was unquestionably proper.

In *FLM*, the Second Circuit held that the Robinson-Patman Act

> ". . . requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances. . . . This principle has been applied in cases which found no violation of § 2(a) in pricing plans which, though varying prices according to different terms of sale, were administered equally to all purchasers." (543 F.2d at 1026).

That "principle" fits this case like a glove. The reduction in Sweeney's hauling allowance resulted directly from the equal administration of Texaco's hauling allowance system among all distributors.

The predicate of Texaco's hauling allowance system was the cost savings generated to Texaco when the distributor relieved Texaco of its obligation under its distributorship agreements to deliver product to the distributor's bulk plant from a point of supply designated by Texaco. And the evidence below was undisputed that by 1970, Macungie was by far Texaco's most economical point for supplying Sweeney's Pottstown location. Nor, as the Third Circuit noted, was there any claim—much less evidence—that "Texaco deviated from its hauling allowance formula by switching [Sweeney's] pickup point from Westville, far from Sweeney's storage facility, to Macungie, much closer to his storage facility." (App. A, at p. 56).[8] That such uniform treatment yields a more advantageous result for one distributor than for another due to factors such as the location of the distributors' bulk plants and the distance between those plants and Texaco's terminals cannot convert a legitimate business practice into a Robinson-Patman Act violation.

Petitioners' argument that Texaco's hauling allowance system was illegally based on a "fictional" point of destination—because some distributors like Sweeney did not transport the gasoline they picked up back to their bulk plants, but instead made deliveries to their customers along the way (Petition at 20)—completely ignores the system's rationale: the hauling allowance was the equivalent of the cost savings to Texaco generated by relieving Texaco of its obligation under all of its distributorship agreements to deliver the product it sold to the distributor's bulk plant. Absent hauling by the distributor,

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8 In fact, if Texaco had done what petitioners suggest—if Texaco had kept Sweeney's supply point at Westville rather than switching it to Macungie, the most economical supply point—Texaco would have deviated from the uniform application of the hauling allowance system.

Texaco was obligated merely to deliver to the distributor's bulk plant; Texaco was not required to act as a resale delivery service for the distributor by dropping off some gasoline at every one of the distributor's retail customers along the distribution route. As Judge Aldisert explained for a unanimous Third Circuit:

> "[I]t is the distributors, not Texaco, who determine where to place their bulk storage plants, and it is the distributors, not Texaco, who decide which retail stations they will supply. Texaco has no control over these decisions; it calculates the hauling allowance solely on the bulk plant's location to the nearest pickup point. On this record, we cannot conclude that Texaco's formula forecloses any distributor from an advantageous hauling allowance." (App. A, at p. 57).

Wholly apart from the Third Circuit's holding of no actionable price discrimination, there was an alternative ground for rejecting petitioners' Robinson-Patman Act damage claim—the basis upon which the district court actually rested its dismissal—that, under the doctrine first enunciated in *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), Sweeney failed to prove that it was injured as a result of the alleged price discrimination. (App. B, at pp. 137-43).

At trial, Sweeney claimed that it was entitled to Robinson-Patman damages equal to two-thirds of the difference between its hauling allowance and Grace Oil Co.'s ("Grace") hauling allowance from Texaco plus one-third of the difference between its hauling allowance and Farm & Home Oil Co.'s ("Farm & Home") hauling allowance. And Sweeney advanced that claim without any evidence that either Grace or Farm & Home actually lowered its prices by using its larger hauling allowance and that Sweeney lost sales or lowered its prices as a result. In other words, Sweeney claimed that it was entitled to automatic damages equal to the amount of the alleged discrimination without proof that the alleged discrimination

caused it any actual injury. (App. A, at p. 53 n.6; App. B, at pp. 135-43).

The district court correctly rejected Sweeney's damage theory on the ground that the Robinson-Patman Act is *not* an automatic damages statute; and that a plaintiff must, therefore, prove it was actually injured by the alleged discrimination. (App. B, at pp. 137-43).[9] *Enterprise Industries, Inc.* v. *Texas Co., supra,* 240 F.2d at 458-60. *Accord, e.g., Chrysler Credit Corp.* v. *J. Truett Payne, Inc.,* 607 F.2d 1133, 1136 (5th Cir. 1979), *cert. granted,* 101 S. Ct. 70 (1980); *John B. Hull, Inc.* v. *Waterbury Petroleum Products, Inc.,* 588 F.2d 24, 29 (2d Cir. 1978), *cert. denied,* 440 U.S. 960 (1979); *Continental Oil Co.* v. *Frontier Refining Co.,* 338 F.2d 780, 782 (10th Cir. 1964); *Dantzler* v. *Dictograph Products, Inc.,* 309 F.2d 326, 330 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963); *Kidd* v. *Esso Standard Oil Co.,* 295 F.2d 497, 498 (6th Cir. 1961).

Nevertheless, Sweeney claims that it "absorbed the increased cost" resulting from the reduction in its hauling allowance and thus was entitled to Robinson-Patman damages under the so-called "direct damage rule" set forth in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.,* 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945). (Petition at 23). But the holding of *Elizabeth Arden* has been severely limited (if not overruled) by the Eighth Circuit itself in *American Can Co.* v. *Russellville Canning Co.,* 191 F.2d 38, 54, 60 (8th Cir. 1951), and by this Court in *Perkins* v. *Standard Oil Co.,* 395 U.S. 642, 648 (1969), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat Inc.,* 429 U.S. 477 (1977) (*see* App. B, at pp. 138-39). Moreover, even if the "direct damage rule" were legally viable, Sweeney failed to introduce any evidence to satisfy its essential factual prerequisite—that it absorbed *the amount of the alleged discrimination.*

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9 Although the Third Circuit did not base its Robinson-Patman affirmance on this ground, it went out of its way to endorse the district court's reasoning. (App. A, at p. 53 n.6).

As Sweeney's Robinson-Patman damage claim itself acknowledges, the alleged discrimination was the difference between Sweeney's hauling allowance and the hauling allowances of Sweeney's competitors. The alleged discrimination was *not* the difference between Sweeney's Westville-based hauling allowance and Sweeney's Macungie-based hauling allowance. (App. B, at pp. 137-38 n.66, 143 & n.72). And yet the evidence upon which Sweeney relies to come within the "direct damage" rule is merely that Sweeney absorbed the difference between its old hauling allowance and its new hauling allowance.[10] (App. B, at pp. 143-44 n.72). Sweeney never even attempted to prove that it absorbed the difference between its hauling allowance and Grace's or Farm & Home's.

The record below was devoid of evidence that Grace's or Farm & Home's prices reflected all or any part of their larger hauling allowances; that Sweeney lost sales to Grace or Farm & Home; that Sweeney ever lowered its prices to compete with Grace or Farm & Home; or of any comparison of the movements in price changes by Sweeney to price changes by Grace or Farm & Home. On such a blank slate, petitioners' Robinson-Patman Act damage claims were properly dismissed, even if the "direct damage" theory were legally cognizable—which it is not.

B. Mission's and Petroleum's Indirect Purchaser Damage Claims Were Properly the Subject of Summary Judgment

Petitioners concede, as they must, that as indirect purchasers, Mission and Petroleum cannot assert claims for damages under Section 1 of the Sherman Act or Section 2(a) of the Robinson-Patman Act unless they fall within an exception to the indirect purchaser doctrine established by this Court in

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10 In fact, even that claim—that Sweeney absorbed the entire change in the hauling allowance—is suspect since petitioners claimed in connection with their effort to avoid the application of *Illinois Brick* that Sweeney did *not* absorb the change, but rather passed it on to Mission and Petroleum.

Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977). Petitioners claim that they fall within "[o]ne exception that this Court explicitly recognized . . . where the indirect purchaser buys under a pre-existing cost-plus contract. *Id.* at 724 n.12, 736." (Petition at 28).

Petitioners have ignored the narrow scope of that exception, however. This Court expressly limited the cost-plus exception to situations where the "customer is committed to buying a *fixed quantity* regardless of price [because in such circumstances] [t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand. . . ." *Illinois Brick, supra,* 431 U.S. at 736 (emphasis added). *Accord, e.g., Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616, 633 n.4 (4th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980); *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 577 & n.9 (3d Cir. 1979); *Abbotts Dairies Division of Fairmont Foods, Inc.* v. *Butz,* 584 F.2d 12, 16 (3d Cir. 1978); *Beckers* v. *International Snowmobile Industry Ass'n,* 581 F.2d 1308, 1310 (8th Cir. 1978), *cert. denied,* 440 U.S. 986 (1979); *United States* v. *Consolidated Edison Co. of New York, Inc.*, 580 F.2d 1122, 1132 n.21 (2d Cir. 1978). Since there admittedly was no *fixed-quantity* cost-plus contract in this case, the Third Circuit's unanimous affirmance of the district court's dismissal of the indirect purchaser damage claims was entirely correct and should not be reviewed by this Court.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: March 27, 1981

Respectfully submitted,

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PROOF OF SERVICE

I, Milton J. Schubin, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27th day of March 1981, I served copies of the foregoing Brief for Respondent Texaco Inc. in Opposition to Petition for Writ of Certiorari, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to Mitchell A. Kramer, Steven Kapustin and Alice G. Burt, Esquires, Kramer and Salus, 1520 Locust Street, Philadelphia, Pennsylvania 19102. I further certify that all parties required to be served have been served.

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